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# THE LEGAL FRAMEWORK FOR BURIAL AND CREMATION IN NEW ZEALAND

A FIRST PRINCIPLES REVIEW



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A FIRST PRINCIPLES REVIEW

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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# Foreword

Until confronted with death, few of us are likely to give much thought to how the law affects how we farewell a loved one and deal with their remains. When faced with this necessity, we often lack the energy or time to consider the ways in which these laws influence the choices available to us with respect to mourning, burial, cremation and memorialisation.

New Zealand's foundational burial statute was passed in 1882. Māori had also established tikanga, or customary laws and practices, to ensure their dead were treated with respect and that the mana of the deceased and their connections to whenua (land), tūpuna (ancestors) and whānau were reinforced.

Evidence of similar values and impulses can be found in the many historic cemeteries established by European settlers during the 19th century and the memorials to the dead erected within them. These cemeteries are important repositories of our heritage and yet today their preservation often depends on the efforts of volunteers.

This review provides us with the first opportunity in our country's history to assess holistically whether the law is meeting our needs and expectations when it comes to how we approach death and the services and options available to us for the care and final disposition of human remains.

The terms of reference for the review extend well beyond the matters currently provided for in the Burial and Cremation Act 1964. The Act's framework has remained fundamentally unchanged for over a century. In that time Parliament has enacted numerous statutes that impact on our burial law and the management of cemeteries. Foremost among these are the Coroners Act 2006, the Historic Places Act 1993, the Reserves Act 1977, the Local Government Act 2002 and the Resource Management Act 1991.

Our cultural landscape has also changed dramatically. These changes can lead to new tensions and may require innovative approaches in order to accommodate the range of public and private interests. For example, our society places particular emphasis on personal autonomy and the right to self-determination, but alongside this there is a growing acknowledgment of the place of tikanga Māori and the importance of connections to places and people. Irrespective of their ethnic origins and ancestry many New Zealanders share these values and are looking for ways to affirm their own connections to the land when they die.

This Issues Paper provides the basis for a well-informed public conversation about these matters. We hope New Zealanders from all walks of life will take this opportunity to help inform the development of our laws in this important and sensitive area.



*Sir Grant Hammond*  
President

# Acknowledgements

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This Issues Paper could not have been written without the assistance of an unusually large number of people and organisations. Throughout the lengthy period of primary research and consultation, we have drawn heavily on the knowledge and practical experience of Sally Gilbert, Manager Environmental and Border Health, and her team at the Ministry of Health; Dr Mike Reid, the Principal Policy Adviser for Local Government New Zealand; and the many local authority cemetery managers and staff who have given so generously of their time.

We are also indebted to the Funeral Directors Association of New Zealand and its Executive Officer Robyn Grooby, New Zealand Independent Funeral Homes Ltd and the recently established New Zealand Cemeteries and Crematoria Collective for their positive engagement with this review.

Our special thanks also to those who provided us with information about the historic cemeteries that continue to be under the management of trustees and to the many individuals and groups who provided advice on myriad issues that have arisen in the course of our research.

Finally, we would like to acknowledge the invaluable contribution of the Law Commission's Māori Liaison Committee chaired by the Hon Justice Joseph Williams. In particular, we are indebted to Sir Hirini Moko Mead, Te Ripowai Higgins (Taurima, Te Herenga Waka Marae at Victoria University), Deputy Chief Judge Caren Fox (Te Kooti Whenua Māori/Maori Land Court), and Tai Ahu (Assistant Lecturer, Victoria University School of Law) for their guidance and advice in relation to te ao Māori and tikanga Māori in the context of death.

The lead Commissioner for this review is the Hon Dr Wayne Mapp. The research, legal and policy advisers are Cate Honoré Brett, Mihiata Pirini, Eliza Prestidge-Oldfield and Joanna Hayward.

Special thanks to the Law Commission's IT and Communications Manager, Lisa McCormick and law clerks Anna Ker, Olivia Krakosky, Ruth Upperton, Paul Comrie-Thomson and Matt McMEnamin for their tireless efforts preparing this paper for publication.

# Call for submissions

The Law Commission is consulting widely with New Zealanders about the issues and reform options contained in this Issues Paper.

As well as face-to-face meetings, we are keen to receive submissions from individual members of the public, interested groups and organisations on the specific proposals put forward in Parts 2-4 of the Issues Paper. These can be downloaded separately from our website and each contains a set of questions about the reform options discussed in that Part.

A stand-alone Summary is also available for download and is intended to be used as a public consultation document. It includes the key questions we ask in relation to the various options for reform contained in each Part of the Issues Paper.

Submitters are invited to respond to any of the questions, particularly in areas that especially concern or interest them, or about which they have particular views. Submitters do not need to address every question.

Submissions can be sent in any format but it is helpful to specify the **number of the question** you are discussing.

Emailed submissions should be sent to:  
**burialreview@lawcom.govt.nz**

Written submissions should be sent to:  
**Burial Review**  
**Law Commission**  
**PO Box 2590**  
**Wellington 6011, DX SP 23534**

Alternatively, submitters may like to use the pre-formatted submission template available on our website at **www.lawcom.govt.nz**

Submissions or comments on this Issues Paper should arrive no later than **20 December 2013**. A final report and recommendations to Government will be published in 2014.

## **Official Information Act 1982**

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Law Commission will normally be made available on request, and the Commission may refer to submissions (including the name of submitters) in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

# Glossary

## TERMS DEFINED IN SECTION 2 OF THE BURIAL AND CREMATION ACT 1964

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The Burial and Cremation Act 1964 assigns particular legislative definitions to a number of terms:

<b>Burial ground</b>	The term used by the Act to refer to <i>denominational burial grounds</i> and <i>private burial grounds</i> (but not <i>Māori burial grounds</i> ).
<b>Cemetery</b>	Land that has been set apart under any statute, or before the commencement of the Burial and Cremation Act 1964, for the burial of the dead generally.
<b>Denominational burial ground</b>	Land outside the boundaries of a <i>cemetery</i> that has been set apart under any statute, or before the commencement of the Burial and Cremation Act 1964, for the burial of the dead belonging to one or more <i>religious denominations</i> .
<b>Disposal (of a dead body)</b>	Includes both burial and cremation.
<b>Local authority</b>	The term used by the Act to refer to a “territorial authority” (a city council or district council) as named in the Local Government Act 2002. <sup>1</sup>
<b>Māori burial ground<sup>2</sup></b>	Land set apart for the purposes of a burial ground under s 439 of the Maori Affairs Act 1953 (now repealed) or under s 338 of the Te Ture Whenua Maori Act 1993/Maori Land Act 1993.
<b>Manager</b>	The manager of a <i>denominational burial ground</i> .
<b>Private burial ground</b>	Land declared to be a private burial ground under the Cemeteries Amendment Act 1912 (now repealed). There is no provision in the Burial and Cremation Act for new private burial grounds to be established.
<b>Trustees</b>	The trustees of a <i>cemetery</i> or of a <i>private burial ground</i> . <sup>3</sup>
<b>Religious denomination</b>	The adherents of any religion. Includes any church, sect, or other subdivision of such adherents.

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<sup>1</sup> A list of all city and district councils is set out in Part 2, Schedule 2 of the Local Government Act 2002.

<sup>2</sup> Also referred to throughout this Issues Paper as an *urupā*.

<sup>3</sup> Note that sometimes the Act treats *trustee* as a global term encompassing *managers*. However, we limit our use of the term “trustee” to those responsible for *cemeteries* and *private burial grounds*. We use the term “manager” to refer to those responsible for *denominational burial grounds*.

## Māori terms

Māori terms used in this Issues Paper have the meanings set out below:<sup>4</sup>

Hapū	Sub-tribal group.
Hui	Meeting or gathering.
Iwi	Tribal group.
Kaumātua	Elders.
Kaupapa	Policy, theme, topic or subject of debate.
Kawa	Protocol; expectations of behaviour.
Mana	The esteem, prestige, authority, status or spiritual power of an individual or collective group.
Marae	A communal place associated with a particular iwi or hapū, serving the social role of a gathering place for hui including tangihanga.
Noa	The converse of tapu: free from the constraints of tapu, ordinary or unrestricted.
Pākehā	Non-Māori New Zealanders.
Tangata whenua	Literally “people of the land”. Used to refer to Māori as the indigenous people of New Zealand, or to refer to the iwi or hapū associated with a particular geographical area.
Tangihanga	Māori funeral rites, usually taking place at a marae, and involving extended family and friends who gather to mourn and farewell the deceased.
Tapu	Sacredness, involving concepts of prohibition or restriction and being set apart from the ordinary.
Te ao Māori	Literally “the Māori world”, used to mean the Māori world-view or the Māori dimension of understanding.
Tikanga Māori	The body of Māori customary law, values, practices, and procedures. Sometimes defined in New Zealand statute law as “Māori customary values and practices”.
Tūpāpaku	The body of the recently deceased person.
Urupā	A Māori burial ground.
Wāhi tapu	Sacred places. The protection of wāhi tapu is recognised under New Zealand law through the Historic Places Act 1993 and the Resource Management Act 1991.
Wairua	The spirit or soul, believed to linger in the human body until departure for Te Pō (world of departed spirits) or to Hawaiki (the ancestral homeland) after death.
Whaikōrero	Speeches and orations delivered on important occasions, often on a marae.

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<sup>4</sup> For further explanation see < [www.maoridictionary.co.nz](http://www.maoridictionary.co.nz) > .

<b>Whakapapa</b>	Genealogy or ancestral history, including relationships with both people and place.
<b>Whānau</b>	Family group.
<b>Whānau pani</b>	The close family members of the recently deceased who are in mourning.
<b>Whanaungatanga</b>	A tikanga value expressing the importance of relationships between all things including between people; between people and the physical world; and between people and spiritual entities.
<b>General terms</b>	
<b>Administrator</b>	A person appointed by the High Court under the Administration Act 1969 to administer the estate (property) of a deceased person who dies without making a will.
<b>Bylaw</b>	A form of delegated legislation usually made by local authorities.
<b>Cemetery Trustees Survey</b>	A survey of cemetery trustees undertaken by the Law Commission in December 2011 to gather baseline information for this review of the Burial and Cremation Act 1964.
<b>Common law</b>	The body of law derived from court decisions rather than from <i>statute law</i> .
<b>Executor</b>	A person appointed under a will to carry out the directions of the deceased for their estate (their property).
<b>Funeral Directors Survey</b>	A survey of funeral directors affiliated with the Funeral Directors Association of New Zealand and New Zealand Independent Funeral Home Ltd undertaken by the Law Commission in November 2012 to gather baseline information for this review of the Burial and Cremation Act 1964.
<b>Local Authority Survey</b>	A survey of city and district councils undertaken by the Law Commission in November 2010 to gather baseline information for this review of the Burial and Cremation Act 1964.
<b>Statute law</b>	The body of law derived from legislation passed by Parliament.
<b>Trustee-managed cemetery</b>	A cemetery managed by trustees. The establishment of trustee-managed cemeteries reflects an earlier model of cemetery management created under the Cemeteries Act 1882 (now repealed). There is no provision in the Burial and Cremation Act for trustee-managed cemeteries to be established.

## Legislative abbreviations

NES	National Environmental Standard. A form of regulation made under s 43 of the Resource Management Act 1991.
LGA	Local Government Act 2002. Sets out the roles and functions of local government in New Zealand.
RMA	Resource Management Act 1991. Provides a framework for resource management, with the overarching purpose of providing for “sustainable management of natural and physical resources.”
TTWMA	Te Ture Whenua Maori Act 1993/Maori Land Act 1993. Provides a framework for the management of Māori Land and sets out the role of Te Kooti Whenua Māori (Māori Land Court).



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# Summary and questions for public consultation

## PURPOSE AND SCOPE OF THE REVIEW

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- 1 Each year approximately 30,000 New Zealanders die and hundreds of thousands of us are affected by the loss of a family member, friend or colleague. While many of us are uncomfortable thinking about death, we must all confront it at some point.
- 2 Until faced with the task of arranging a burial or cremation, few of us are likely to be aware of the laws and regulations that control such matters as where, when, and how burials and cremations may take place; the legal responsibilities of those making decisions and arrangements on behalf of the deceased; and the responsibilities of those who establish and manage funeral homes, cemeteries and crematoria.
- 3 The most important of these laws is the Burial and Cremation Act 1964 (the Act) and its associated regulations.<sup>5</sup> The statute's primary purpose is to ensure that every community has access to places for burial and cremation. Cemeteries are an essential public service and in New Zealand local authorities (councils) have the legal responsibility for providing them. Some local authorities also provide cremation services but they are not legally obliged to do so. In some parts of the country cremation services are provided entirely by the private sector, often in conjunction with a funeral home.
- 4 But the functions funeral homes, crematoria and cemeteries perform in society go well beyond the purely pragmatic. Our dignity as human beings is not extinguished the moment we die. This principle underpins how we mourn, care for and memorialise our dead. It is explicitly recognised in our criminal law, which makes it an offence for anyone to “offer an indignity” or “improperly or indecently interfere” with any dead human body. It is also an offence for anyone to neglect to perform any duty they are required to undertake with respect to the burial or cremation of a deceased person.<sup>6</sup>
- 5 As a society we have a strong interest in being able to care for and mourn our dead in a manner consistent with our culture and beliefs. How we approach death can be a potent expression of our ethnic and cultural identity because “the ways that people bid farewell to and inter their dead are a well-worn path for asserting what is held dear to the departed and their nearest and dearest.”<sup>7</sup>
- 6 Even after burial the law continues to play a role. For example, there is a legal presumption that once buried, a body should not be disturbed. Many also believe that land used for human burial has a special status, and that the law ought to ensure that the spiritual and heritage values attached to such places are protected.<sup>8</sup>

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5 These include the Cremation Regulations 1973 and the Burial and Cremation (Removal of Monuments and Tablets) Regulations 1967. There are also the Health (Burial) Regulations 1946 made under the Health Act 1920 to regulate mortuaries.

6 Crimes Act 1961, s 150.

7 Ruth McManus *Death in a Global Age* (Palgrave Macmillan, Basingstoke, Hampshire, 2013) at 122.

8 Māori regard burial grounds as wāhi tapu or sacred places. The protection of wāhi tapu is recognised under New Zealand law through the Historic Places Act 1993 and the Resource Management Act 1991.

- 7 Despite our fast-paced and mobile lives the public response to events such as the desecration of graves in Auckland’s historic Symonds Street Cemetery, the clearance of decorations from Waikumete Cemetery’s “stillborn sanctuary” and the sale of old burial grounds associated with closed churches in various parts of the country, suggests many New Zealanders continue to care strongly about these matters.<sup>9</sup> The very public and long-running dispute sparked by the sudden death in 2008 of an ordinary citizen, James Takamore, also shows the depth of feeling which can arise when families cannot agree on a loved one’s final resting place.<sup>10</sup>
- 8 However, New Zealand is now a very different place from the country in which the Act came into force nearly half a century ago. Like all aspects of culture, our approach to death is constantly evolving, together with our attitudes towards the human body, disease, mortality, religion and family.
- 9 This review provides a timely opportunity for the public to reassess the principles and values that should direct this sensitive area of our law. The publication of this Issues Paper is an important milestone in the process and gives all New Zealanders the opportunity to have input into shaping the laws which will govern these matters for future generations.

## Our approach

- 10 This is the second Issues Paper to be published as part of the Law Commission’s review of burial law. The first, published in May 2011, dealt with the legal system for certifying deaths and authorising cremations.<sup>11</sup> This second Issues Paper brings together over two years of research and preliminary consultation with the Ministry of Health (which administers the Act), local authorities, the cemetery and funeral sector, experts in Māori customary law and representatives of various ethnic communities.<sup>12</sup> This lengthy period of research reflects the broad scope of our terms of reference and the fact that this is a “first principles” review.
- 11 As well as assessing whether the Act remains fit for purpose, our terms of reference also ask us to address a number of issues that are not currently provided for in the statute. These include asking what role, if any, our burial statute should play in helping citizens to resolve burial disagreements, and assessing whether there is a case for regulating funeral services.
- 12 Alongside these big policy questions we assess how the primary legislation interfaces with other key statutes,<sup>13</sup> and the respective roles central and local government and the private sector should play in the provision and management of cemeteries and crematoria.
- 13 It is unlikely that the general public will want to comment on all the questions we pose about these fine-grained administrative and operational reforms. However we expect significant public interest in many of the big picture questions arising in this sensitive area of law.
- 14 The purpose of this Issues Paper is to provide the public with sufficient information about the current law and how it is operating to help them respond to these questions. To make the Paper more accessible, we have divided it into four parts: **Part 1** comprises two **introductory chapters**: the first provides an overview of the whole Paper, the principles underpinning our approach and the preliminary conclusions we have reached. The second chapter explains the important

9 Amy Maas “Crude desecration of graves punished” (27 February 2013) *Stuff* < www.stuff.co.nz > . Michael Morrah “Auckland council apologises for destroying graves” (4 February 2013) *3 News* < www.3news.co.nz > .

10 See ch 15 for full discussion of *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 and related issues.

11 Law Commission *Final Words: Death and Cremation Certification in New Zealand* (NZLC IP23, 2011).

12 In approaching the many religious and cultural issues that can arise at the time of death we have been grateful for the knowledge and insights of representatives of a number of different ethnic groups and in particular the guidance and advice of the Law Commission’s Māori Liaison Committee. We have also drawn extensively on the arguments and reasoning of the New Zealand courts in determining *Takamore v Clarke*.

13 These include the Resource Management Act 1991, the Local Government Act 2002, the Reserves Act 1977, the Historic Places Act 1993, the Health Act 1956, and the Coroners Act 2006.

social and cultural context for the review. **Part 2** focuses on the Burial and Cremation Act and the policy issues that arise about the provision of **places for burial and cremation**. **Part 3** deals with the **funeral sector** and the services and facilities needed to support the recently bereaved. **Part 4** deals with **decision-making and disagreements** at the time of death. Each of these parts can be downloaded separately from our website at [www.lawcom.govt.nz](http://www.lawcom.govt.nz).

- 15 Below we summarise the main issues and set out the key questions we would like the public to consider when giving feedback on the wide-ranging reforms we propose.

### Key reform options

- 16 As a result of our research and preliminary consultation we are putting forward a number of significant potential reforms for debate. Among the most far reaching is to bring cemetery land management under the Resource Management framework, whereby we propose to:
- open the cemetery sector up to independent providers including those wishing to establish “eco” or “natural” burial grounds or cemeteries that meet the needs of different ethnic groups;
  - make it possible for New Zealanders to be buried on private land such as a family farm;
  - require local authorities to consult more closely with their communities and in particular ethnic groups over the development and management of new and existing cemeteries; and
  - require local authorities to ensure all cemeteries under their control are maintained to a minimum standard and their heritage values adequately protected.
- 17 Our reform options in relation to funeral service providers and crematoria include:
- requiring professional funeral service providers to comply with minimum disclosure rules around their qualifications and the pricing of the separate components of their services;
  - introducing a new legal requirement that all crematoria have a licensed operator or supervisor;
  - requiring resource consents for new crematoria to be publicly notified; and
  - introducing expanded regulations for the operation of crematoria and handling of human ashes by crematoria.
- 18 In relation to decision making and disagreements in the context of burials we seek public feedback on the merits of:
- enacting a new statutory regime to clarify which individual or group should have the authority to make decisions when a serious burial dispute has arisen within a family, and the factors which that person/persons must take into account when making a decision; and
  - where the decision is challenged, giving the Family Court jurisdiction to make burial orders, require mediation, and refer cases involving tikanga to the Māori Land Court for resolution (if appropriate and agreed by all parties).
- 19 Throughout the summary we provide references to the relevant chapters of the Issues Paper in which we explain the rationales behind these proposals and seek more detailed feedback on the policy options. We begin with a very brief explanation of the legal framework within which bereavement and burial and cremation services are currently provided in New Zealand.

## LAW AND CURRENT PRACTICE

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- 20 People may be surprised to learn how few legal requirements actually apply in the period after death in this country. For example, there is no legal requirement to engage a funeral director or to have a body embalmed. Nor does the Act stipulate how a person should be buried or who has the responsibility to ensure burial or cremation takes place. Essentially, all the law requires is for a doctor to certify the cause of death and for whoever has taken charge of the body to “dispose of it” within a reasonable time.<sup>14</sup>
- 21 The Act is silent on how the disposal should take place. It simply states that every local authority in New Zealand must provide a “suitable cemetery” and that these cemeteries must be open for the “interment of all deceased persons, to be buried with such religious or other ceremony, or without any ceremony, as the friends of the deceased think proper.”<sup>15</sup>
- 22 The Act provides no direction for those who may find themselves caught up in an irresolvable dispute over the burial or cremation of a family member, as occurred following the death of James Takamore in 2008. In such cases they must resort to the High Court where a judge decides the merits of the competing claims according to case law. (Not many New Zealanders are aware that case law gives the executor of the deceased’s estate the presumptive right to make the decision if there is a conflict or dispute as to arrangements.)<sup>16</sup>
- 23 The public may also be surprised to learn that currently anyone is entitled to set themselves up as a funeral director or crematorium operator. No formal training is required and there is no legal requirement for funeral directors or the operators of crematoria to belong to a professional body or to be subject to an independent auditing or complaints process. (Most funeral directors are, in fact, professionally trained and voluntarily comply with the standards set by their own industry body, the Funeral Directors Association of New Zealand.)
- 24 The light-handed regulatory environment described above does not necessarily match most people’s experiences when arranging a funeral and interment or cremation. To begin with, New Zealanders are constrained in their choice as to where they are buried. For example, under the current law it is not usually possible for a person to be buried on their own land – although someone with Māori ancestry may be able to be buried in an urupā (Māori burial ground) associated with their hapū.<sup>17</sup> Nor do most people have much choice over the location or type of cemetery in which they are buried as under the current law only local authorities are permitted to establish public cemeteries.<sup>18</sup>
- 25 As the sole providers of public cemeteries, local authorities are able to decide where cemeteries are established and how they are managed. The Act also empowers them to dictate matters such as when and how burials may take place, the rights of those who enter into contracts for burial and the type of memorials permitted. Local authorities also have complete discretion as to whether different ethnic and religious groups are permitted to establish special areas within the public cemetery.
- 26 The choices bereaved families make about funeral and cremation arrangements are often similarly constrained. Although there is no legal requirement to engage a funeral director, have a body embalmed, or purchase a coffin, the reality is that very few cemeteries or crematoria deal

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14 Burial and Cremation Act 1964, s 46E.

15 Section 6.

16 See ch 15.

17 See ch 3 at [3.10]–[3.11].

18 Religious groups may be permitted to establish burial grounds for their members on private land (the term “burial ground” is used to distinguish these religious burial places from public cemeteries).

directly with the families of the deceased. Often families do not feel equipped to prepare the body for burial, and as yet there are few alternatives to embalming for those wishing to delay burial and cremation to allow for a tangihanga (funeral rites) or other commemorations of the deceased's life.

- 27 However this has not always been the case and, for reasons we explain in chapter 2, may not be the case in the future. In some ethnic and religious communities it is vitally important for bodies to be prepared according to custom by members of their own faith. Some also have a desire for a simpler and more direct approach to death and burial, which may involve alternative methods of preservation before a simple interment in a shroud or biodegradable coffin.
- 28 At the moment it can be difficult for those wishing to tailor funeral and burial services to their own requirements to do so because few providers are willing to unbundle their services and access to alternative forms of interment such as eco or natural burials is limited.
- 29 In this Issues Paper we examine the strengths and weaknesses of the current law and practice and put forward our preliminary proposals for reform.

## **OVERVIEW OF PART 2 – BURIAL AND CREMATION: THE ADEQUACY OF THE LEGAL FRAMEWORK**

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- 30 The Burial and Cremation Act has been in force for almost half a century but its key provisions – and the language in which they are expressed – have remained largely unchanged since the first comprehensive burial law was passed in 1882.<sup>19</sup> Unsurprisingly, the Act's primary focus is on burial, as this was the most common practice at the time.
- 31 New Zealand's earliest cemeteries were developed in an ad hoc manner in response to the needs of small rural communities, and were managed by voluntary trustees. This mirrored the traditional Māori approach to urupā, which tended to be intimate and closely connected with a particular marae. Later, municipal authorities established cemeteries such as Wellington's Bolton Street Cemetery and Auckland's Symonds Street Cemetery to service the needs of the growing urban populations.
- 32 The 1882 statute brought all land used for burial – except urupā – under a common legal structure irrespective of how the land had come to be set aside. It also made clear that it was the local authority's responsibility to meet the community's burial needs in cases where there was inadequate provision, although many cemeteries continued to be managed by trustees.<sup>20</sup> The Act also made provision for portions of public cemeteries to be set aside for the exclusive use of different denominational groups and in that way allowed for religious diversity within the secular framework of a public cemetery.
- 33 The reforms enacted in 1964 retained this basic structure but further entrenched the role of local authorities by extinguishing the right of other entities, such as trusts, to open new public cemeteries. The only exception is for religious groups, who are still entitled to apply to the Minister of Health for permission to set up burial grounds on private land for the exclusive burial of their members.
- 34 Although the Act empowers local authorities to control most aspects of how cemeteries are managed, it reserves considerable decision-making power in the Minister of Health (the Minister), which in practice is delegated to officials. For example, decisions about the opening, closing, transfer of ownership and even the naming of cemeteries, and the construction and

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19 Cemeteries Act 1882.

20 Around 100 of these trustee-managed cemeteries continue to exist today and are discussed in Part 2.

opening of crematoria all require the approval of the Minister. The Minister also has the power to make decisions about applications for burial in special places and the establishment of denominational burial grounds.

- 35 Despite the Act's strong emphasis on protecting public health (a particular concern at the time burial legislation was first enacted in England and New Zealand), most of the Act's provisions are actually concerned with operational and land management issues.

### What's changed?

- 36 New Zealand has undergone dramatic social change since the 1964 Act was passed. Our population is much more ethnically diverse and mobile than was the case in the 1960s. Our beliefs and attitudes towards death and the risks posed by human remains have also changed. An estimated 70 per cent of the urban population are now cremated rather than buried.<sup>21</sup> Some suggest cremation has become so popular in New Zealand because it fits with the "no frills" mentality of Kiwis. It is also usually cheaper than burial and is increasingly offered as part of a package by funeral homes who either own or are in partnership with a local crematorium.
- 37 However, convenience and price are not the only factors influencing decisions about these matters. Māori traditionally have placed great importance on returning the body of the deceased to the land. Traditionally the preference for burial has been shared by New Zealanders from many other ethnic and religious traditions including Pasifika, Jewish, Muslim and Catholic.
- 38 Changes in our demographic make-up and approaches to death are reflected in some of the trends identified by the local authorities who took part in our survey.<sup>22</sup> In some parts of the country, immigrant communities are looking for ways in which they can accommodate their beliefs and customs in public cemeteries and crematoria. Councils are also reporting a growing interest in eco or natural burial grounds as people look for more environmentally friendly approaches to death. Another notable trend is the desire of some to have a more direct involvement in the preparation of graves and the burial itself. And both local authorities and the Ministry of Health note the frustration of those New Zealanders who wish to be buried on their own land or in a rural place of special significance to them but are unable to do so under the current framework.
- 39 At an operational level, local authorities also report grappling with the ripple effects of our increasingly complex family structures. This can lead to disputes over who has the right to be interred in family plots, or to inter ashes in an existing plot and what authority is required to disinter a body.
- 40 Alongside these trends, our research revealed ongoing problems with the maintenance and preservation of cemeteries. This is a problem that is particularly acute in some of our oldest trustee-managed cemeteries and burial grounds, which are repositories of historic graves notionally protected under the Historic Places Act. In some cases attempts to transfer responsibility of such cemeteries to local authorities are frustrated by the obscure legal ownership and arcane management arrangements to which they are subject.

### The case for change

- 41 The first question we ask is whether the existing law adequately protects the public interest in ensuring that burial and cremation take place in a manner that is lawful, respectful and which does not cause offence.

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<sup>21</sup> See ch 8.

<sup>22</sup> See ch 4 for discussion of the Local Authority Survey findings.

42 Our preliminary view, based on research, is that the current framework meets these basic interests, although a number of problems arise because of the age of the legislation. However, as a first principles review, we are required to look beyond these basic requirements to ask whether the legal framework itself remains fit for purpose given the changes that have taken place in New Zealand over the last half century. Specifically, we ask whether and to what extent the law should also:

- protect the diverse cultural and spiritual needs of individuals and groups with respect to burial and cremation; and
- protect land used for human burial, ensuring it is adequately maintained and our cultural heritage preserved.

43 These two questions involve value judgments and the weighing of different public interests. For example, while some may regard the current prohibition against burial on private land as an unjustifiable limitation on personal freedom, others may be concerned that the proliferation of private burials presents a risk to the sustainable management of land. Similarly, while some may wish to see a more permissive approach to how and when burials take place in public cemeteries, others may be concerned about the impact on other cemetery users and the potential health and safety risks. And while some are concerned at the failure to adequately maintain and preserve our historic cemeteries, others may prefer to see public funds directed at providing better amenities for the living rather than memorials for the dead. These are all matters on which we look forward to receiving public feedback.

## Preliminary conclusions

### *Cemeteries*

44 Overall, our preliminary view is that the legal framework within which burial is provided for in New Zealand has become unnecessarily inflexible, and too narrowly focused on perceived public health risks and the operational needs of providers rather than the needs of the community. While we accept that there are legitimate practical, fiscal and health and safety rationales for continuing to regulate human burial, we do not believe these justify the current restrictions on where and how New Zealanders are buried.

45 In our view the current Act places insufficient weight on the various human rights engaged at the time of death. As a society we are increasingly concerned with protecting the autonomy and dignity of the individual and the rights to freedom of expression, including freedom of religious practice and freedom of belief. As discussed earlier, the different ways in which we approach death form a vital part of our culture and ethnicity. At the very least, we believe the law should only interfere with the expression of such beliefs at the time of death to the extent required to protect other clear public interests, such as public health and safety.<sup>23</sup>

46 We also think a new framework for establishing and managing cemeteries is required and that there is a case for ensuring land used for human burial is better protected than is often the case under the present regime. Most importantly, in our view the Resource Management Act 1991 now provides a much more suitable framework and tool kit for dealing with the mix of planning, environmental and cultural issues engaged in the establishment and long-term management of cemeteries, burial grounds and crematoria.

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23 See ch 2 at [2.40].

## Cremation

- 47 The cremation sector has some unique policy drivers. Alongside the universal requirement to ensure the deceased and their remains are treated with dignity and respect, both during and after the cremation process, there is also the need to ensure cremation is not used to destroy evidence of crime or other wrong-doing such as abuse or neglect.
- 48 Because cremation generally takes place in a private place without the presence of families or other witnesses it is particularly important that the regulatory processes are robust. Processes are already in place to ensure no one is cremated before their identity and cause of death have been confirmed by an independent medical practitioner. In an earlier Issues Paper we put forward options to reform this certification process and make it both simpler and more effective.<sup>24</sup>
- 49 However, our initial consultation and review of cremation regulations in other comparable countries has led us to the preliminary conclusion that the controls on how and where crematoria are established, and by whom, are not sufficiently robust. In particular we are concerned at inadequate or inconsistent public consultation on the establishment of new crematoria, the lack of industry-wide standards and quality assurance systems and the lack of any systematic auditing other than in an environmental/air quality context. While we have no evidence that the weaknesses in the current system are leading to bad practice or illegality, the lack of any systematic oversight (other than from an emissions perspective) reduces the chance of such breaches being detected.

### Preliminary reform options for cemetery and cremation sector

- 50 We suggest devolving decision-making power and regulatory oversight for cemeteries and crematoria from central government to local authorities, and replacing the land management scheme set out in the Act with the Resource Management framework. We propose a National Environmental Standard be developed to ensure a consistent approach to the establishment, management and long-term maintenance of all cemeteries in New Zealand.
- 51 Within this broad framework we suggest the following specific options for reform:<sup>25</sup>
- opening up the cemetery sector to independent providers including those wishing to develop alternative burial options such as eco-burial grounds;
  - providing greater scope for individuals to be buried on private land;
  - providing for greater diversity and burial choice in public cemeteries;
  - introducing minimum maintenance standards for public cemeteries;
  - introducing a new legal requirement that all crematoria have a licensed operator or supervisor;
  - introducing expanded regulatory controls for the operation of crematoria and their handling of human ashes;
  - transferring responsibility for authorising crematoria from central government to local authorities under the Resource Management Act; and

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<sup>24</sup> *Final Words: Death and Cremation Certification in New Zealand*, above n 11.

<sup>25</sup> See chs 7 and 9.

- introducing a requirement that all resource consent applications for new crematoria be publicly notified so that any potential adverse effects on amenity values can be taken into account.
- 52 Under these reform proposals local authorities would continue to play a central role in the provision of cemeteries but they should not have a monopoly over the sector. Instead, the cemetery sector would be opened to a range of “independent cemetery providers” operating within the framework of the Resource Management Act.<sup>26</sup> Independent cemeteries could, for example, establish special purpose eco-burial grounds on private land. A protective covenant under the Resource Management Act would run with the land and bind potential successors of title.
- 53 The laws prohibiting burial on private land would be repealed. Under our proposed reforms a person wishing to be buried on private land would still need prior approval, but decisions would be made at a local authority level in accordance with the relevant district or regional plans, rather than by central government officials under the current “exceptional circumstances” criteria.
- 54 Local authorities would also be required to provide a greater range of choice for separate burial areas within cemeteries subject to certain criteria. They would also be required to proactively consider the different burial preferences of their communities when establishing new cemeteries or developing new areas within existing cemeteries.<sup>27</sup> Local authorities would be legally obliged to maintain public cemeteries in a dignified and pleasant manner and to undertake appropriate work to protect and enhance heritage and amenity values as funding priorities permit.
- 55 In addition to these specific reform proposals we also seek public feedback on whether a legal or regulatory response to the following two issues is needed.
- 56 First, when the Act was drafted burial was the norm in New Zealand and it was therefore logical that it should focus on the provision of public cemeteries. Today a significant majority of New Zealanders opt to be cremated but local authorities are not specifically required to provide their communities with access to publicly funded crematoria. We are interested to know whether there are issues with access to cremation services in some parts of the country and whether, for example, in areas where there is sufficient demand there may be a case for local authorities making provision either themselves or in partnership with a private provider.<sup>28</sup>
- 57 Second, at present there are no specific regulations governing the scattering or disposal of human ashes. In some cases the bereaved choose to inter ashes in a cemetery; in other cases they may be buried or scattered in a public or private place of personal significance. In some instances they may not be recovered from the crematorium. These different scenarios can create problems. For example, in some cultures the release of ashes into flowing water is an important cultural and religious ritual, but it can cause cultural offence to others. Many Māori regard human ashes as tapu and intermingling ash with waters used for food gathering or recreation is culturally offensive. Similarly, failure to collect ashes from crematoria can create real dilemmas, such as how long they should be retained and what should be done with them after that point, for those who operate these facilities.

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26 See ch 7 at [7.42] – [7.57].

27 See ch 7 at [7.28]–[7.30].

28 See chs 7 and 8.

## CONSULTATION QUESTIONS FOR PART 2: CEMETERY AND CREMATION SECTOR

- Q1 Would you support opening the provision of cemeteries up to independent providers, such as those providing cemeteries for “eco” or “natural burials”, complementing the public cemeteries provided by local authorities? (see chapter 7 at [7.42] – [7.52]).
- Q2 If so, do you think those establishing independent cemeteries should be limited to registered charities? Should independent cemeteries be allowed to make a profit? (see chapter 7 at [7.45]).
- Q3 Should it be lawful for someone to be buried on private land, provided the necessary consents have been obtained? (see chapter 7 at [7.67] – [7.69]).
- Q4 Where practically possible, should local authorities be required to provide separate burial areas within public cemeteries for groups with specific religious or cultural burial requirements? (see chapter 7 at [7.28] – [7.31]).
- Q5 Do you think the law should establish minimum standards for the maintenance of cemeteries? (see chapter 7 at [7.22]).
- Q6 Do you think there should be stronger legal provisions for the protection of historic cemeteries and grave sites? (see chapter 7 at [7.88]).
- Q7 Do you think those who operate crematoria should be licensed? Please give reasons. (see chapter 9 at [9.21] – [9.28]).
- Q8 Do you think resource consents should be required for all new crematoria and should they be publicly notified under the Resource Management Act? (see chapter 9 at [9.39]).
- Q9 Do you think there should be stronger regulatory controls over the operation of crematoria and the handling of human ashes by crematoria? (see chapter 9 at [9.9] – [9.14]).
- Q10 Do you think there is a problem with the availability of cremation services in any particular area of New Zealand? (see chapter 8 at [8.78] – [8.87]).

## OVERVIEW OF PART 3 – FUNERAL SERVICES: THE ADEQUACY OF THE REGULATORY ENVIRONMENT

- 58 Any proposal to increase the regulatory oversight of the funeral sector must be based on an analysis of the risks and benefits of the current arrangements. On one level the lack of legal prescription can be viewed as positive because it allows considerable freedom in how we deal with and respond to a death. On the other hand, it affords few specific protections for those dealing with the funeral sector.
- 59 In chapter 11 we discuss the unique characteristics of the market in which funeral directors operate. The purchasing decisions we make at the time of a loved one’s death are unlike other purchasing decisions. Arranging a funeral, burial or cremation is not an everyday occurrence and the need for speed and easy access to services may lessen the likelihood of shopping around. The trend towards vertical integration (where a funeral director may also provide cremation services and ash interment options) also increases the risk of consumer capture at the point

- of sale. Those making such arrangements may be dealing with shock and grief, making them uniquely vulnerable.
- 60 Often, too, there is a strong desire to honour the deceased and pay tribute to their lives with a “fitting send-off”. What this requires can vary greatly depending on ethnicity, customs, and the beliefs and values of the bereaved. Often it will involve significant expense. The most basic funeral and cremation cost an estimated \$6,500 and while for some the financial burden may be shared among the extended family and the wider community of mourners, for others it will rest entirely with the immediate family or be covered by the deceased’s estate.
- 61 Funeral directors perform a vital public service in our community and the Funeral Directors Association of New Zealand informs us that complaints are uncommon. However our preliminary view is that the potential for serious emotional distress arising from unethical or inappropriate behaviour over the handling of the dead combined with the unique vulnerabilities of the clients may justify stronger regulatory oversight.
- 62 Ideally, the public would continue to be able to opt out of using a funeral director, especially when operating under cultural norms or personal values that differ from mainstream practice but with real choice and accountability for those who engage professional services. Given this objective we are mindful of the risk of creating barriers to alternative styles of funeral preparation; nor do we wish to add unnecessary compliance costs to the sector, resulting in higher charges.
- 63 The objectives of these reform options are to help consumers make more informed and meaningful choices when engaging with the funeral sector and to provide greater transparency around the qualifications, costs and standards pertaining to the range of services provided by the sector. In chapter 12 we outline a number of options for consideration. Here we seek feedback on our currently preferred options which include:
- a requirement that all funeral service providers *proactively* disclose on their websites and other promotional materials the prices for the separate elements of the different services they offer; and
  - a requirement that they disclose to potential customers the qualifications held in relation to the different services provided, and inform customers of their affiliation or non-affiliation with an industry body that has a code of ethics and a complaints system.
- 64 In addition to these consumer protections, at this point we also favour strengthening the regulatory requirements that apply to those providing commercial funeral services to the public. Specifically we suggest that:
- a mandatory requirement would be introduced for all those providing funeral services to the public to be licensed by the appropriate local authority; and
  - before obtaining a licence the applicant would have to demonstrate to the local authority health inspector that they understand the health risks associated with handling deceased bodies, have access to suitable premises and transportation methods, understand the legal obligations regarding death and cremation certification, and are a “suitable person” to be providing such services to the public.

### CONSULTATION QUESTIONS FOR PART 3: FUNERAL SERVICES SECTOR

- Q11 Do you think those providing funeral services to the public should be required to proactively disclose the costs of the different components of their services? Please give your reasons. (see chapter 12, Option 1 at [12.13] – [12.28]).
- Q12 Should those providing funeral services to the public be required to disclose their qualifications and whether or not they are accountable to an industry body responsible for enforcing standards and considering complaints? (see chapter 12, Option 1 at [12.13] – [12.28]).
- Q13 Do you think those providing funeral services to the public should have to demonstrate they understand the laws and regulations which apply to handling human remains and have access to suitable premises and transportation methods before being allowed to operate commercially? (see chapter 12, Option 2 at [12.29] – [12.40]).
- Q14 Do you have any other views about the way the funeral sector currently operates including whether there is a case for a mandatory code of conduct and complaints mechanism? (see chapter 12, Option 3 at [12.41] – [12.52]).
- Q15 Do you think there is a case for requiring local authorities to provide a basic funeral service for those who wish to deal directly with a cemetery or crematorium? (see chapter 12 at [12.53] – [12.54]).

### OVERVIEW OF PART 4 – FACILITATING DECISION MAKING AND MANAGING DISAGREEMENT

- 65 Despite the great diversity in how we approach death, those of us making final arrangements for a family member or close friend share a common motivation – simply to “do the right thing” by the dead. Usually this will include acknowledging their lives, the importance of their relationships and preserving a sense of connection between them and ourselves and the family members who have gone before us.
- 66 But the cultural lens through which we view death can lead us to quite different conclusions about what is, in fact, the right thing to do. For those with deep religious convictions it will often be important to perform certain rituals and ceremonies after death; for others it will be important to affirm connections between the deceased and the places and people who have been particularly significant in their lives; others still may prefer to forgo all public ceremonies and memorials in favour of a private cremation and scattering the ashes.
- 67 Because this is a first principles review of the law, the cultural values and expectations informing our different views of death must be clearly articulated. For example, some may consider that honouring the deceased creates a moral obligation to ensure the final arrangements reflect what the deceased would have wanted – even perhaps when this conflicts with the values and beliefs of those responsible for carrying out the instructions. Others, however, may think that death engages much wider family and community interests and obligations than simply enacting the wishes of the deceased – in other words, that the dead must accommodate the needs of the living.
- 68 Despite the potential complexities, good will and the pragmatic need to make final arrangements usually result in a relatively straightforward decision-making process. However, our

preliminary consultation suggests that New Zealand's increasing ethnic diversity and the complex family structures associated with separation and re-partnering combine to create an environment in which disputes may become increasingly common about what should occur at the time of death and who should have decision-making authority. Long-standing personal conflict between individuals or different branches of a family may sometimes come to the surface in times of stress and grief. Funeral directors have signalled their unease at finding themselves caught in the middle of such disputes and may feel ill-equipped to deal with the complex cultural and interpersonal dynamics which can come into play. In the most extreme cases a body may be forcibly removed and buried before there has been an opportunity to resolve the dispute. Aggrieved parties may then be faced with the emotionally and procedurally difficult issue of applying for an order for disinterment.

- 69 In Part 4 of the Issues Paper we discuss how the law should respond when relatives of the deceased find themselves locked in dispute about what is the right thing to do following a loved one's death.

### The current legal position

#### *Common law*

- 70 One of the fundamental roles the courts play in society is providing a forum for the peaceful resolution of disputes according to the law. For burial disputes, the forum is currently the High Court. The rules and principles the Court will apply in a burial dispute are derived solely from case law (that is, the body of law formed by legal precedents set down by judges deciding cases brought before them.) The rules set down in those cases are not found in any modern statute enacted by Parliament, but instead form part of the common law. The leading New Zealand authority is the case of *Takamore v Clarke* but many historical English cases will also be relevant.
- 71 The key common law rule applied by the courts in burial disputes, and upheld in New Zealand in *Takamore*, is the "executor rule." Under this rule, which originates in 19th century English common law, the executor of the deceased's estate has the legal right and duty to both make funeral arrangements and to decide how and where a person is to be buried. In this sense, the executor's decision-making power over burial arrangements can be seen as an extension of their duty to carry out the deceased's instructions with respect to the disposal of their personal property. If there is no will, and/or no executor, the court can appoint another person to make these decisions – typically the deceased's partner or a close adult relative. However, in *Takamore* the executor rule was confirmed by a majority of only three out of five members of the Supreme Court, with two members concluding it did not form part of New Zealand's common law. This indicates that there may be different views about the continued appropriateness of this rule in burial disputes in modern circumstances.

#### *Tikanga Māori*

- 72 As well as the common law, Māori custom law or tikanga must also be taken into account. While there is ongoing debate and discussion as to the precise status of tikanga within the New Zealand legal system, there is no doubt that consideration of tikanga and its underlying values will be taken into account by the courts when adjudicating disputes involving a Māori deceased or Māori custom. Rules and customary practices based in tikanga have also evolved over hundreds of years and give expression to the fundamental principles, values and beliefs which underpin Māori culture.

- 73 Under tikanga, the primary consideration to be taken into account when determining where a person should be buried is how best to restore or preserve that person's connections to their tribal land, their ancestors and their surviving whānau. Returning the deceased to the land that nurtured them and cementing their ancestral ties is important not only for the deceased but also for the health and mana of the whānau and iwi. Often the deceased's whakapapa (genealogy) will give rise to a number of competing claims for their body to be repatriated to different tribal areas. One of the important functions of the tangihanga is to provide a structured forum in which these sometimes robust debates can be resolved. The force and length of discussions often reflect the mana of the deceased and are an important way of honouring them in death. Those who are unfamiliar with the values and principles underpinning these processes might be confused or distressed by the sometimes intense and forceful nature of the discussions.
- 74 As can be seen from this brief description, the rules and decision-making processes under tikanga and the common law differ significantly. Under common law the burial decision is made by a single person, the executor. Judges have tended to actively discourage "unseemly" disputes, emphasising the need and desirability for cases to be decided swiftly. In contrast, Māori customary law facilitates and encourages discussion and argument over the place of burial. The emphasis is on collective discussion and debate in deciding where the deceased will lie.
- 75 There are, nonetheless, commonalities between tikanga Māori and common law. In both cases the views of the deceased are relevant but not treated as binding. And in both cases there is a requirement for consultation – and often compromise. For example, the executor's powers are qualified under the common law and cannot be exercised in a high-handed or arbitrary manner. If a Court is called upon to review their decision they should, according to *Takamore v Clarke*, assess whether the executor gave appropriate weight to the views of the deceased and the deceased's family and friends, including any cultural, spiritual and religious requirements that should have been taken into account. Discussion and debate, whether it occurs within tikanga, or a Court-based forum, may illustrate the esteem in which the deceased is held and their importance in the lives of the living.
- 76 It is also important to note that not all disputes arise from cross-cultural conflict. In some cases the source of the dispute might arise from conflicting religious affiliations within a family, or may reflect competing claims for control between former partners, siblings or offspring.
- 77 Whatever the source of the dispute, the High Court is intended to act as a circuit breaker or final arbiter, allowing the burial to proceed if it has not already taken place, and attempting to find an acceptable remedy or compromise in cases where a disputed burial has already occurred.

### Is there a problem?

- 78 For the law in this area to be effective it has to be principled, accessible (known and understood by the citizens who are subject to it) and capable of providing speedy resolution of disputes so that the grieving process is not unduly interrupted or the deceased's dignity compromised. When a dispute escalates or some precipitous action is taken, such as the removal of a body, law enforcement agencies need to respond consistently and speedy access is needed to a neutral forum with the authority to make a binding decision and provide a meaningful remedy.
- 79 In our view the current situation does not meet these criteria. The common law executor rule is not widely known or understood. Moreover, it will have little practical application where the executor is unknown at the time these decisions are being made, or there is no executor and no other person has been appointed to fill that role. Even after *Takamore*, questions and issues about executor rule remain – including the appropriateness of the rule, given that its

original purpose was to clarify the executor's financial obligation to meet the funeral and burial costs, rather than because they had some moral authority to make decisions about what was appropriate.

80 As discussed, tikanga provides its own framework for decision making in the context of death but it requires all parties to be willing – and able – to operate effectively within this system. This will not always be the case and as we saw in *Takamore* difficult issues can arise when either or both parties are faced with a decision-making process they do not fully understand or feel comfortable with, and which results in an outcome they consider to be inappropriate or even harmful.

81 In *Takamore* the Supreme Court clarified that the High Court should approach future cases by considering each on its own merits and reaching its own conclusion about the appropriateness of the executor's decision. Where relevant, tikanga and its underpinning values will be considered alongside the views of the deceased, when known, and the views and needs of any spouse, parents, children and other near relations, and any other significant relationships. The difficulty, however, is that for most people the High Court is a very public and expensive machinery to engage in such a personal and urgent matter.

82 We are aware that any proposals for statutory reform will inevitably have to grapple with the intersecting values and interests we have discussed above. We also believe any statutory framework should draw on the best of both legal traditions – providing certainty and clarity about what the law is and at the same time putting in place a mechanism for the speedy resolution of disputes through a consultative process that respects and balances the values of both the deceased and their kinship group. At the same time, that single legal system must accommodate New Zealand's increasing ethnic diversity.

### Possible options for reform

83 One possible option is to replace the common law executor rule with new statutory provisions, to render the law more accessible and effective for anyone in a burial dispute and to introduce greater clarity and certainty into the law. In chapter 15 we explain our rationale for putting forward this option. In essence it is based on our view that the status quo fails to provide citizens with sufficient guidance as to their respective rights and obligations in these matters, and fails to provide an effective and accessible method of dispute resolution when they find themselves in conflict.

84 In chapter 16 we set out some of the different ways in which such a statutory regime might be designed and the values that might underpin it. For example, should it place the responsibility for making these decisions on a person, or group of persons, specifically nominated for the role by the deceased? Or, in cases where the deceased has not expressed a clear view, should the statute establish a hierarchy of people entitled to make the decision based on their kinship relationship with the deceased? Or should we move away from the idea of having a single individual with the authority to take control and instead attempt to design a statute which facilitates a more collective approach – and is therefore more in tune with how these decisions are actually made in most circumstances?

85 Irrespective of which decision-making model – or combination of models – we opt for, we also need to decide what weight the decision maker/s would be required to place on the various interests and values involved. For example, should the views of the deceased have greater legal force? How should the views of the wider family and cultural requirements be accommodated? Should the views of close friends have some place alongside those of family?

- 86 Even with clear statutory guidance as to who has the right to decide and what factors they must take into account when making a decision, it is inevitable that there will be times when the decision will be disputed. In such cases we believe an independent and authoritative forum is needed for attempting to resolve the dispute, and failing that, to make a binding and enforceable ruling.
- 87 At present that role is assigned to the High Court. However, for reasons we outline in chapter 17 we believe the High Court is not necessarily best suited to deal with burial disputes. Instead, we ask whether the following options may be preferable:
- confer jurisdiction over burial disputes on the Family Court;
  - provide the Family Court with powers to make orders for burial directions;
  - make the Family Court’s mediation processes available where appropriate to disputing parties;
  - provide the Māori Land Court with concurrent jurisdiction to make orders in cases involving Māori customary law with the agreement of all parties.
- 88 In our view there are good policy and practical reasons in favour of transferring primary jurisdiction from the High Court to the Family Court. The Family Court is more accessible (physically and financially), it is used to moving swiftly and with relative informality and, most significantly, it is used to dealing with the type of emotionally charged relational and cultural issues that often underpin burial disputes.
- 89 By referring cases to the Māori Land Court when appropriate, it would also be possible to draw on the Māori Land Court’s knowledge and expertise of tikanga when interpreting and applying any new statutory provisions.
- 90 In chapter 18 we conclude our review with a discussion of aspects of what we describe as “secondary decision-making” that families can face after burial or cremation has taken place. Here we assess the adequacy of the legal tools and mechanisms available to resolve disputes which may arise in these different contexts. We think that the specific issues of memorialisation and the custody of ashes may warrant Family Court dispute resolution processes being available to disputing parties where necessary and appropriate.
- 91 We also examine the issue of scattering or burying human ashes on public land. We outline the issues and current lack of consistency in local authority policy. We welcome feedback on the nature and extent of the problem in any particular part of the country and the nature and extent of any desired reform.

### **The public’s views**

- 92 The collective whakapapa of New Zealanders is rich and diverse and includes Māori, European, Pasifika and Asian traditions. These cultures and their burial traditions should provide strength and flexibility to our approach to the question of resolving burial disputes.
- 93 From a legal perspective, New Zealand has a deserved reputation internationally for innovative approaches to many socio-legal problems, including pioneering models based on the principles of restorative justice and collective problem solving in forums such as family group conferences.
- 94 We hope that the public debate on these issues will be able to draw on these strengths and allow for a constructive and informative discussion of the possible reforms. In particular, we are keen to hear from New Zealanders of all ethnic origins and backgrounds about the principles and

values they think should underpin our reforms, and how best the law and the courts can help resolve serious disputes when they arise.

- 95 Any new statutory regime must be flexible, but it must also provide guidance on three key questions: who, if anyone, should have the right to make the final decision when there is a burial dispute; what factors must the decider/s take into account when making a decision; and what role should the courts play when the decision that has been reached is strongly opposed by one or more parties? There are no easy or right answers to these questions but to help design any new decision-making model it will be helpful to know the most important values New Zealanders think should underpin any new decision-making framework.

#### CONSULTATION QUESTIONS FOR PART 4: FACILITATING DECISION MAKING AND MANAGING DISAGREEMENT

- Q16 Do you think the process for resolving a serious burial dispute should be clarified in legislation? Please give reasons. (see chapter 15 at [15.26] – [15.28]).
- Q17 Any new statutory regime would need to reflect the values New Zealanders think should underpin the law in this area. For example, the wishes of the deceased have great moral force, but should they be legally binding? Or are the needs of the bereaved more or equally important? We are interested in the weight New Zealanders think should be given to the different values and interests involved in these decisions. (see chapter 16 at [16.9] – [16.26]). Please order the following values 1–7, with 1 being the most important value and 7 the least. If you think several factors should be given the same weight, give them the same ranking:
- meeting the needs of any surviving partner to mourn and commemorate the deceased in a way they consider most appropriate;
  - meeting the needs of close relatives to mourn and commemorate the deceased in a way they consider most appropriate;
  - ensuring the wishes of the deceased, if they have been clearly expressed, are carried out;
  - ensuring that cultural needs, such as reconnecting the deceased with a significant place and with their family lineage, are met;
  - ensuring that the family’s religious requirements in relation to mourning and burial are met;
  - ensuring that all those with a strong interest in the decision, such as the deceased’s extended family/whānau, are given an opportunity to be consulted and express their views;
  - ensuring there is clear and certain legal responsibility for making burial and cremation decisions and clear guidance for decision makers; and
  - are there any other factors or values you think should be taken into account?
- Q18 Irrespective of who makes the decision or what factors they take into account, there will be times when a serious dispute arises and access to a legal forum is needed. Do you support the option of giving the Family Court the responsibility for dealing with burial and cremation disputes? (see chapter 17 at [17.20] – [17.25]).
- Q19 Do you support the option of giving the Māori Land Court concurrent jurisdiction in cases involving Māori customary law where all parties agree the dispute be heard in that forum? (see chapter 17 at [17.26] – [17.29]).

Q20 Do you support the option of giving the Family Court responsibility for dealing with disputes concerning memorialisation (for example the erection of headstones) or the custody of ashes? (see chapter 18 at [18.47] – [18.48]).

Q21 Do you feel that scattering or burying human ashes in public places is problematic? If so what are the most appropriate measures for dealing with this issue? (see chapter 18 at [18.23] – [18.42]).

# Part 1

## INTRODUCTION



# Chapter 1

## What our review is about

### SCOPE OF THE REVIEW

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- 1.1 In New Zealand the events that unfold after a death are usually straightforward: a doctor establishes the probable cause of death and issues a “medical certificate of cause of death”; the body of the deceased is prepared and may be embalmed, and a funeral or tangihanga is held to farewell the deceased. Finally, the deceased’s body is interred in a public cemetery or urupā (Māori burial ground), or, more typically today, cremated. These practices and rites usually take place within a week or 10 days of the death. In the case of cremation, the ashes may be placed in an urn or other receptacle and either retained by the family or formally interred in a cemetery. Alternatively, they may be buried or scattered in some place of significance to the deceased. It is also common for some form of memorial to be placed on the gravesite or where ashes are interred. This may not occur until the first anniversary of the death.
- 1.2 How we approach each stage of this process, the decisions we make, and the options available to us, are influenced by a mix of law, custom, belief, and pragmatism. While these influences can lead to considerable diversity in how we respond to death, *everyone’s decisions are constrained by the same legal parameters*. These parameters determine where, when and how burials and cremations may take place; the legal responsibilities of those making decisions and arrangements on behalf of the deceased; and the responsibilities of those who establish and manage funeral homes, cemeteries and crematoria.
- 1.3 This is the first time in our history that these laws have been the subject of a “first principles” review. Instead of simply assessing whether the law is workable, accessible, enforceable and consistent with other relevant statutes,<sup>29</sup> we must also ask whether the underlying principles and policy objectives remain appropriate. Does the law meet New Zealanders’ needs and expectations when it comes to how we approach death, the services available to the bereaved, and the options available to us for the final disposition of human remains?
- 1.4 This broad brief is a reflection of the wide range of legal and policy questions posed in our terms of reference. These were developed in conjunction with the Ministry of Health, which is responsible for administering the Burial and Cremation Act 1964 (the Act), and require us to undertake a process of targeted and public consultation to determine the principles, policies and objectives which should drive legislation regulating the handling and burial of the dead in contemporary New Zealand. Specifically, we are asked:
- (i) To determine whether the public interest requires the retention of primary legislation or whether the control and regulation of burials and cremations could be devolved to local authorities.
  - (ii) To improve the efficiency and effectiveness of the legislation by eliminating the current overlap and duplication between the Act and related legislation and regulations.

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29 These include the Coroners Act 2006, the Health Act 1956, the Reserves Act 1997, the Local Government Act 2002, the Historic Places Act 1993 and the Resource Management Act 1991.

- (iii) To deal explicitly with a number of issues, including whether the Act in its current form is meeting public expectations and needs for the handling and burial or cremation of the dead with specific reference to:
    - the care and custody of the body after death;
    - the provision of culturally appropriate options for burial or cremation;
    - the responsiveness to individual or group requirements that fall outside the ambit of the current Act (for example, eco or green burials);
    - the suitability of religious affiliation as the sole criteria for the establishment of burial grounds; and
    - the responsiveness of the Act and associated territorial bylaws to the beliefs, customs and practices of Māori.
  - (iv) To examine the interface between the Act, the Coroners Act 2006, the Health Act 1956, the Local Government Act 2002 and the Resource Management Act 1991 to identify redundant and or duplicate provisions.
  - (v) To identify any residual public health provisions in the Act and make recommendations as to the most appropriate legal vehicle for these provisions.
  - (vi) To consider whether the current system of self-regulation of funeral directors should be continued or whether an alternative system of regulation should be instituted.
  - (vii) To consider whether nationally consistent regulations are required to regulate the dispersal of human and animal ashes to avoid cultural offence and nuisance.
  - (viii) To examine the adequacy and efficiency of the current laws and regulations relating to death certification and notification, and in particular whether there should be a statutory provision for certifying life is extinct.
  - (ix) To prepare an issues paper, undertake targeted and public consultation on the issues and call for public submissions.
  - (x) To prepare a final report and draft Bill including recommendations for the most appropriate government department to administer the new Act.
- 1.5 While many of these questions focus on the machinery of the 1964 Act and how it interfaces with our modern statutes, others raise fundamental policy questions about the choices available to us and the way decisions are made at the time of death, and the value our society places on the maintenance and long-term preservation of memorials and land used for human burial.
- 1.6 The public response to events such as the desecration of graves in Auckland’s historic Symonds Street Cemetery, the clearance of decorations from Waikumete Cemetery’s “stillborn sanctuary” and the sale of old burial grounds associated with closed churches in various parts of the country, suggests many New Zealanders continue to care deeply about these matters.<sup>30</sup> The very public and long-running dispute sparked by the sudden death in 2008 of James Takamore also shows the depth of feeling that can arise when families cannot agree on a loved one’s final resting place.<sup>31</sup>
- 1.7 Given the unusually broad range of issues we address in this review we have divided this Issues Paper into four parts. **Part 1** comprises two “scene setting” chapters. In this first chapter we

30 Amy Maas “Crude desecration of graves punished” (27 February 2013) Stuff < [www.stuff.co.nz](http://www.stuff.co.nz) > . Michael Morrah “Auckland council apologises for destroying graves” (4 February 2013) 3 News < [www.3news.co.nz](http://www.3news.co.nz) > .

31 See ch 15 for full discussion of *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 and related issues.

explain the **principles** we consider should underpin the law in this area and provide an **overview of the different policy questions** posed by our terms of reference. In chapter 2 we discuss the social and cultural context in which we are conducting this review and how it influences our approach.

- 1.8 **Part 2** of the Issues Paper focuses on the **Burial and Cremation Act** and the policy issues arising with respect to the **provision of places for burial and cremation** in the 21st century. In **Part 3** we discuss the adequacy of the legal and regulatory framework within which the **funeral sector** operates in New Zealand. Finally, in **Part 4** we discuss the rights and obligations that apply when making decisions about final arrangements and the role of the law and courts in **resolving disagreements** among the bereaved. Each of these Parts can be downloaded separately from our website at [www.lawcom.govt.nz](http://www.lawcom.govt.nz).
- 1.9 In each Part we do three things: identify the relevant public and private interests; assess whether the existing legal and regulatory framework is adequately protecting these interests and if, in our assessment, there is a case for reform; and put forward options for reform for consideration by the public and stakeholders.
- 1.10 A number of the policy questions we have been asked to address in this review fall outside the current ambit of the primary legislation. For example, the Act provides no direction as to who has a right to bury or cremate the dead, or how disputes over these matters are to be resolved. In our discussions of the law relating to custodial rights over the body, we look instead to New Zealand's common law (the body of law derived from court decisions rather than from statute law) and to tikanga Māori (the body of Māori customary law, values and practices).
- 1.11 Similarly, the Act does not provide any sort of regulatory framework or standards for individuals or businesses providing services to the bereaved, such as funeral directors and embalmers. Instead we currently rely on the general Consumer Guarantees Act 1993 and the Fair Trading Act 1986 for consumer protections and remedies in this area.
- 1.12 An overarching question for this review is whether this patchwork of statutory and common law is the most effective way of addressing the wide spectrum of public and private interests identified in our terms of reference, or whether it may be preferable to draft a comprehensive statute encompassing all relevant law in an accessible and coherent form.
- 1.13 However, before deciding on the desirability or shape of any reforms in this sensitive area of law, it is vital that as a society we first identify and discuss the policy objectives and the values and principles that should underpin this review.
- 1.14 The purpose of this introductory chapter is to set out the key policy questions raised by our terms of reference and to outline the various public interests that need to be considered when assessing whether or not there is a case for reform. We begin by outlining the broad principles that in our view should inform policy and law in this area.

## OUR PRINCIPLES

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- 1.15 How we approach death as individuals and as a society must accommodate two fundamental interests: our need to mourn and our need to manage the immediate biological reality of physical decomposition. Australian succession law expert, Professor Prue Vines, sums up this dichotomy by saying that our responses to death are influenced by a mix of the “sacred and the profane”.<sup>32</sup> Many of the rituals and practices that have traditionally governed how bodies are handled

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<sup>32</sup> Prue Vines “The Sacred and the Profane: The Role of Property Concepts in Disputes about Post-mortem Examination” (2007) University of New South Wales Faculty of Law Research Series 13.

and disposed of in different cultures reflect these two drivers: they provide important vehicles for the expression of human grief and connection with the deceased, while at the same time ensuring that the timing, manner and place of burial does not “harm” the living spiritually or physically.

- 1.16 Like all aspects of culture, our responses and practices around death are not static but evolve along with our values, beliefs and understanding of the human body, mortality and disease. As we discuss in chapter 2, New Zealand has undergone major social and cultural change since our burial laws were last reviewed in 1964. Since that time many aspects of Māori culture, including the tangihanga, have had a defining impact on our social and legal landscape. The increasingly diverse ethnic make-up of our population and changing family structures are also influencing our approach to bereavement and death.
- 1.17 However, we would argue that, notwithstanding these changes, the law in this area must continue to be informed by some fundamental common principles and values, the most important of which are human dignity and respect for the deceased.

### Human dignity

- 1.18 Respect for the deceased is a fundamental human value common to most cultures. At common law, the right to a decent burial has long been recognised, based on the importance of respect due to human remains. In many cultures, including under tikanga Māori, the tūpāpaku (body of a recently deceased person) is considered to have a special status somewhere between death and life, and the living have specific duties to take care of it.
- 1.19 In collective conceptions of human rights, the dignity and autonomy of the group can be negatively affected by any mishandling of the body of a recently deceased member of the group. This is true in Māori contexts where the mana of the whānau pani (bereaved family) would be damaged if the tūpāpaku were not cared for and appropriately honoured. The same concepts inform many other cultural and religious approaches to the deceased.<sup>33</sup>
- 1.20 In New Zealand, respect for the deceased is a value explicitly recognised in our criminal law: anyone who “improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not” may be imprisoned for up to two years.<sup>34</sup> Even long after burial, there is a presumption that human remains should be left undisturbed. In New Zealand a licence from the Ministry of Health is required before anyone may disinter a body,<sup>35</sup> and closed cemeteries may not be sold or used for other purposes.<sup>36</sup>
- 1.21 Moreover, it can be argued that respect for the dignity and autonomy of the living require us to have respect for the dead. This is because of the interest each of us has in knowing that our bodies will be treated with dignity and will be decently disposed of after death. There is also arguably a broader interest. Respect for human rights requires us to uphold individual rights, but it also requires us to adopt an overall attitude of honouring human dignity. Whether or not we believe that a dead body has a particular spiritual status, there is a common sentiment that an indignity to a human body fails to respect the dignity of the person whose life has recently ended.
- 1.22 We therefore support a framework that recognises the significance of the deceased person’s remains, both to the bereaved, including the deceased’s whānau, iwi or hapū, and because of

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<sup>33</sup> See ch 2.

<sup>34</sup> Crimes Act 1961, s 150.

<sup>35</sup> Burial and Cremation Act 1964, s 51.

<sup>36</sup> Section 43(2).

the inherent status of human remains as the last physical presence of a person whose life has recently ended.

### Tikanga Māori

- 1.23 In our view tikanga Māori (customary law) must influence the shape of any reform. The imperatives of tikanga as it relates to death, mourning and the tangihanga are significant and deeply held. There are also strong connections to other significant aspects of tikanga including connections to whenua (land),<sup>37</sup> tapu (sacredness or separateness),<sup>38</sup> whakapapa (ancestry) and whanaungatanga (the centrality of relationships to the Māori way of life). The Law Commission has previously noted “the importance of developing a legal system that reflects New Zealand’s cultural heritage and of which all New Zealanders, not just the dominant majority, feel a part.”<sup>39</sup>

### Freedom of belief and practice

- 1.24 New Zealand law explicitly recognises the rights of all citizens to practice their faith. Section 15 of the New Zealand Bill of Rights Act 1990 (BORA) states:

Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

- 1.25 The right of individuals who belong to an “ethnic, religious, or linguistic minority in New Zealand” to “enjoy the culture” and “profess and practise” the religion of that minority is also expressly protected under BORA.<sup>40</sup>
- 1.26 It is our view that these provisions encompass the rights of different religious and ethnic groups to carry out the various religious rituals and cultural practices observed at the time of death, an event universally imbued with religious and cultural significance. For these reasons the legal framework that governs decisions about how New Zealanders approach death should not unduly restrain citizens from carrying out their mourning practices, and any limitations contained in this framework must have a clearly articulated and defensible policy basis.

### Administrative efficiency and accessible law

- 1.27 The Law Commission Act 1985 explicitly states that one of our objectives is to ensure that the content of our laws and the language in which they are expressed is as clear as possible. This is to make our law accessible and enforceable. When reviewing a statute that has been in place for as long as the Burial and Cremation Act, it is also vital to review whether the overarching framework and concepts are compatible with other relevant New Zealand statutes. We are also required to evaluate the respective roles and powers of central and local government and the most appropriate legal and non-legal tools to use to achieve the relevant policy goals.
- 1.28 Together, these principles inform our approach to the policy problems and possible reforms we discuss in this Issues Paper. We are interested in the public’s views of these principles and the relative weight they should be given in the policy process.

## THE POLICY QUESTIONS

- 1.29 We now turn to the key policy questions our terms of reference require us to address. As discussed, these questions are not confined to the area of law that governs cemeteries and

37 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 47–49.

38 At 36–39.

39 *Māori Custom and Values in New Zealand Law*, above n 37, at 6–7. See also Law Commission *Coroners* (NZLC R62, 2000) at [212]; Law Commission *Justice: The Experience of Māori Women* (NZLC R53, 1999) at [424]; Law Commission Act 1985, s 5(2)(a).

40 New Zealand Bill of Rights Act 1990, s 20.

crematoria, but also extend to the legal and regulatory framework within which funeral services are provided and within which burial disputes are resolved.

- 1.30 Below we set out the questions we have been asked to address in each of the different areas of the review. We identify the various public and private interests that need to be taken into account when assessing how well the current laws are working and whether there is a case for reform.

### **The provision of places for burial**

- 1.31 In Part 2 of the Issues Paper we focus on the Burial and Cremation Act 1964 (the Act) and the questions in our terms of reference that relate to the provision and management of places for burial and cremation. Some are “first principles” questions about the appropriateness or otherwise of the current constraints on the choices available to the public. Other questions are more narrowly focused on the machinery of the Act and whether it remains fit for purpose.
- 1.32 The Act’s framework has not fundamentally changed since New Zealand’s foundational burial law was enacted in the late 19th century. The Cemeteries Act 1882 provided the blueprint for the provision and management of cemeteries for the next 125 years and was heavily influenced by public health concerns and the need to ensure that burials took place in an orderly and controlled manner. The Cemeteries Act’s original purpose was to ensure that every community in New Zealand had adequate access to places for the burial of their dead. It achieved this by imposing a legal obligation on local authorities to provide public cemeteries.
- 1.33 Public health and administrative efficiency remain the key policy drivers underpinning the current statute. The Act’s main objectives are to ensure that all burials in New Zealand take place within a public cemetery and that all land used for burial, no matter how it was originally obtained or set aside, is subject to similar controls and management regimes. (Burials on Māori land are exempt from the Act’s provisions.) The Act makes some provision for religious diversity within the confines of a public cemetery and in some circumstances also allows denominational groups to establish burial grounds on private land. Apart from denominational groups, only local authorities are legally permitted to establish and manage public cemeteries under the current Act. Local authorities have broad discretionary powers, allowing them to determine how cemeteries operate and the extent to which personal and cultural expression is permitted in matters such as how a person is buried and memorialised.
- 1.34 Our terms of reference ask whether this comparatively restrictive approach to burial is still justified. Specifically, we are asked to assess whether the regulatory framework within which local authorities are operating public cemeteries is sufficiently responsive to the needs of their communities, including the different cultural and religious groups within them. We are also asked to consider the needs of those whose personal values or convictions may not be accommodated within conventional cemeteries – for example, those who wish to be buried in an “eco” or “natural” burial ground. In assessing the current constraints we are mindful of the importance of the human rights framework discussed earlier, and particularly the importance of religious freedom and the freedom to practice one’s customs and beliefs.
- 1.35 In chapter 5 we discuss whether these principles are given adequate weight under the current burials framework, or whether there is a case for adopting a more rights-based and less restrictive approach to where and how New Zealanders are buried. We also consider the risks and benefits of any liberalisation of our burial law and the implications for other important public and private interests involved. These include our interest in ensuring minimal risk to public health or potential for offence, and ensuring that land used for human burial is adequately protected.

- 1.36 In chapter 6 we turn to this second important limb of our assessment of the current law – the way land used for human burial is managed under the Act. In particular we focus on the difficulties arising from the lack of any central database of land used for human burials in New Zealand, and the fact that at present no legal requirement exists for land used for burial to be formally designated.
- 1.37 As noted in the terms of reference, in addition to the Act a number of other key statutes have an impact on how cemeteries are managed and protected. For example a great deal of land set aside for public cemeteries has the legal status of a reserve and is thus subject to the management requirements of the Reserves Act 1977. Also, many cemeteries and burial grounds in New Zealand contain graves dating back to the 19th century, which means they are automatically classified as an archaeological site as defined in section 2 of the Historic Places Act 1993.<sup>41</sup> Such sites may not be “destroyed, damaged or modified” without special authority.<sup>42</sup>
- 1.38 One of the questions we ask in this Issues Paper is how well the framework for establishing, managing and preserving cemeteries set out in the Act meshes with these other statutes, and in particular whether the Resource Management Act and its associated tools would provide a better framework.

## Cremation

- 1.39 From as early as 1874 the law has explicitly recognised New Zealanders’ right to be cremated. Today an estimated 70 per cent are cremated, although rates vary significantly from region to region and within different demographic and ethnic groups. As with any service associated with death and its aftermath, the principle that bodies should be treated with dignity and respect applies at every stage of the cremation process. This includes how bodies are handled and stored before cremation, the process of cremation itself and the collection and handling of ashes.
- 1.40 But there is also an overriding imperative to ensure that the process of cremation is not used for illegitimate purposes including for example, the destruction of evidence of a crime or other wrong-doing such as neglect. Therefore, there is strong public interest in a robust regulatory environment capable of maintaining the integrity of the cremation sector and detecting abuses. The process of incineration also produces emissions into the atmosphere and has the potential to impact adversely on air quality and the amenity value of the area in which crematoria are cited.
- 1.41 At present the risks associated with cremation are partially addressed by the legal authorisations required before crematoria may be established, and by the regulations setting out the authorisations required before a body may be cremated. These laws and regulations are spread across the Act, the Resource Management Act, the Cremation Regulations 1973, and crematorium rules and bylaws. Some, but not all, of the policy concerns discussed above are addressed by these laws and regulations. The key provisions in the Act focus on the approvals process required before a crematorium can be established, while the accompanying regulations concentrate on minimising the risks of wrong-doing in the actual cremation process via a relatively onerous certification process.
- 1.42 The adequacy of the cremation certification processes and the checks and balances required under the current regulations were considered by the Law Commission in a separate Issues

41 Under this Act an “archaeological site” includes any place in New Zealand that “was associated with human activity that occurred before 1900”.

42 Historic Places Act 1993, s 10(1). The Act provides for the protection of New Zealand’s cultural heritage and wāhi tapu (defined in s 2 as a place “sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense”) through the use of heritage orders and covenants controlling the use and development of such sites. These designations are enforced through the Resource Management Act 1991 and given effect through district plans adopted by local authorities throughout the country.

Paper published in May 2011. Our preliminary conclusion was that despite the complex and multi-layered approvals process required before cremation may take place, the lack of independent auditing significantly undermined the effectiveness of the regulations. Our final recommendations for reform in this area will be included in our final report due to be published in 2014.

- 1.43 In this Issues Paper our main concern, which we address in chapter 8, is the absence of any provisions specifically focused on the integrity of the sector, including the lack of industry best practice codes and independent auditing. In chapter 9 we consider how comparable overseas jurisdictions approach these matters and put forward preliminary proposals for strengthening the legal and regulatory framework.
- 1.44 We also consider whether we need to take into account community interests and sensitivities in establishing and operating crematoria.

### The Funeral Sector

- 1.45 Respect for the dignity of the deceased is also a key principle when considering the adequacy of the regulatory framework within which those providing funeral services operate. Currently, however, the law provides very little direction and few specific protections on what happens to the body after death. The Act simply requires that disposal of a body occurs within a “reasonable time.”<sup>43</sup> Provided the death is properly certified and registered, there is no legal requirement for a funeral director or any other professional person to be engaged in the processes that occur before burial or cremation.
- 1.46 Despite no legal requirement to do so, the vast majority of New Zealanders do in fact use the professional services of funeral directors. At present anyone in New Zealand is able to set themselves up as a funeral director or embalmer. There are voluntary industry bodies providing optional training and a complaints service in relation to its members. But there are no compulsory training requirements, as the sector is not subject to any external regulation other than the registration of mortuaries under the Health (Burial) Regulations 1946. Nor is there any consumer protection legislation directed specifically at the funeral sector
- 1.47 The majority of funeral directors and embalmers are members of their own professional organisations, which set standards, oversee training and provide a mechanism for resolving complaints. However, they are under no legal obligation to join or to abide by the decisions of the complaints body.
- 1.48 Our terms of reference ask us to consider whether this current system of self-regulation should be continued, or whether an alternative system of regulation should be instituted. A number of different principles and public interests must be borne in mind when assessing the case for stronger regulatory oversight of the funeral sector. The integrity of the sector and public assurance are vital to protect the fundamental interest in ensuring bodies are treated with dignity and respect. However, before recommending any change to the current light-handed approach we would need to demonstrate that there is a problem with the status quo and that it requires a legislative response.
- 1.49 In the absence of any external regulator, the public depends on general consumer law, such as the Fair Trading Act 1986 and the Consumer Guarantees Act 1993 in its dealings with the funeral sector. However, for reasons we outline in chapter 11, this is not a typical consumer market, as decisions about how to manage the death of a loved one are made infrequently and often under considerable pressure. The services are usually required urgently and must be

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43 Burial and Cremation Act, s 46E.

geographically close. Often the processes are not well understood and pricing is not transparent or readily comparable with other providers. Nor do most people feel capable of opting out and managing the processes themselves.

- 1.50 In chapter 12 we discuss these problems and the preliminary evidence for providing the public with greater transparency and increased protections in their dealings with the sector. We put forward for public consultation and debate a number of possible options for reform.

### Decision making and dispute resolution after death

- 1.51 Two of the most critical and sensitive questions posed in our terms of reference are the adequacy of the law with respect to the “care and custody of the body after death” and the law’s responsiveness to the “beliefs, customs and practices of Maori”. These are the questions we turn to in **Part 4** of the Issues Paper where we focus on the role the law should play in facilitating decision-making and managing serious disagreement at the time of death.
- 1.52 Earlier in this chapter we set out the principles that underpin our approach to this review. These principles obviously have particular import when considering the rights and obligations of the living towards the recently deceased. However, while these principles provide an important foundation for this discussion they do not provide neat solutions to what are very complex legal and policy questions.
- 1.53 For example, while most people would accept that treating the deceased with respect and dignity extends to ensuring the “right thing” is done by them at the time of their death, deeply felt disagreements can arise as to what the “right thing” means and how such decisions should be reached. The source of such disagreements may be personal, cultural, religious or a mix of all three. Frequently they will highlight quite fundamentally different values individuals and cultures place on personal autonomy, family and community.
- 1.54 At present the Act is silent on these issues. In cases where there is a serious dispute, it is left to the Courts to adjudicate on a case-by-case basis, drawing on the rules judges have developed as they have decided cases brought before them. Under New Zealand case law, in the event of a dispute or lack of consensus about these arrangements the executor appointed by the deceased, or the person legally entitled to fulfil that role, has the right of decision. That right of decision is subject to the supervision of the High Court.
- 1.55 This position is consistent with English common law, which has long held that the executor of the deceased’s estate has the exclusive right to decide how and where the deceased’s body is disposed of. However, this is not necessarily consistent with Māori customary law, which allows for more collective decision making, or with other areas of New Zealand’s statute law, such as the Human Tissue Act 2008, which recognises the autonomy of the individual to determine whether to donate their body or body parts after death.
- 1.56 While it is rare for such disputes to reach the courts for resolution, the case of *Takamore v Clarke* illustrates how divisive these issues can be, not just for the immediate family but also for the wider community.<sup>44</sup> In *Takamore*, three levels of the New Zealand courts (the High Court, the Court of Appeal and the Supreme Court) sought to accommodate the principles of certainty and administrative efficiency, which underpin the common law executor rule, with tikanga Māori, where decisions about a person’s place of burial are determined collectively, taking into account relationships with ancestors and the land itself.<sup>45</sup>

<sup>44</sup> *Takamore v Clarke* (SC), above n 31.

<sup>45</sup> See ch 2 at [2.21 – [2.26].

- 1.57 In Part 4 we unpack these complex issues and consider how best to reflect the different perspectives and values involved in the various types of dispute that can occur around the time of a person's death and immediately afterwards. We examine the principles underpinning the common law position and analyse the strengths and weaknesses of an exclusively common law approach to resolving such disputes.
- 1.58 We also examine secondary and related decisions to be made by family and friends of the deceased, including the custody of ashes, memorialisation, disinterment and additional interments. Cremation and the handling and dispersal or interment of human ashes can also give rise to difficult legal and policy issues, and our terms of reference ask whether nationally consistent regulations are required to regulate the dispersal of human ashes to "avoid cultural offence and nuisance".
- 1.59 As stated earlier, as a matter of principle it is vital that any reforms in this area reflect the cultural heritage of all New Zealanders and take proper account of tikanga Māori. As a matter of principle it is also important that New Zealand's law is clear, accessible and enforceable. While any attempt to provide statutory guidance in this area will be challenging, it may also be in the public interest. We look forward to hearing the public's views on these matters.

## THE CHALLENGE

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- 1.60 We began this chapter by describing the universal human needs that determine the way we approach death: the need to respond to the biological reality of bodily decomposition and the need to mourn the dead. Our laws and customs are intended to facilitate both these needs, and are informed by the overriding principle that human dignity requires that the bodies of the recently deceased are treated with respect and the bereaved are free to mourn in the manner they deem appropriate.
- 1.61 However, as is evident from this introduction, alongside these core principles the law must attempt to accommodate an unusually wide range of public and private interests. Often there will be tension between these different interests. For example, as individuals we may have a strong personal interest in fewer legal restrictions over how and where our bodies are buried, but as citizens we also have an interest in ensuring burials do not take place in an uncontrolled and haphazard manner. Similarly, as individuals we may feel we have a strong interest in being able to direct what happens to our bodies after death, but as members of bereaved families we may see merit in a more nuanced and collective approach to such decision making. Finally, as a nation we may have strong interest in ensuring our historic cemeteries and memorials are preserved in perpetuity, but this is only one of the many competing interests our elected local body representatives must juggle when allocating ratepayer funds.
- 1.62 Whether there is a case for reform of our burial and cremation laws – and if so, what shape those reforms should take – will in large part be determined by the input of New Zealanders who take the opportunity presented by this review to express their views on the values and principles they think should inform this area of law.
- 1.63 However, law reform does not take place in a vacuum. In the next chapter we describe the important ways in which our society has changed since our burial law was last reviewed and the relevance of our ethnic diversity for any proposed reforms.

# Chapter 2

## How we approach death

### INTRODUCTION

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- 2.1 The terms of reference for this review require us to assess how well our burial and cremation laws are meeting the cultural and spiritual needs of the diverse religious and cultural communities, including Māori, that make up New Zealand today.
- 2.2 As we discussed in the introductory chapter, the current legal framework has not fundamentally changed since New Zealand's burial law was reformed in 1882.<sup>46</sup> At that time the most pressing policy drivers were the need to ensure all communities had access to cemeteries and that burial took place in a manner that did not endanger public health.
- 2.3 Within those parameters New Zealand's burial law reflects an admirably liberal approach to how the citizens of this country might express their beliefs when the time comes to bury the remains of a loved one. Section 6 of the Burial and Cremation Act 1964 (the Act) simply states that:
- Subject to the provisions of this Act, every cemetery shall be open for the interment of all deceased persons, to be buried with such religious or other ceremony, or without any ceremony, as the friends of the deceased think proper.
- 2.4 When that provision first entered our statute book in 1882,<sup>47</sup> the boundaries of religious and ethnic diversity were much more narrowly defined than they are today, or even in 1964 when our burial law was last reviewed. In the middle of last century New Zealand's population of around 2.1 million was still predominantly of European and Māori descent: 92 and six per cent respectively.<sup>48</sup> Only one per cent originated from other places, namely the Pacific, India and China. Five decades on, at the time of the 2006 census, the country's demographic make-up had radically altered; nearly one in four people living in New Zealand had been born overseas and nearly half of these had been in New Zealand less than a decade.<sup>49</sup> Of the total population 67.6 per cent identified as European, 14.6 per cent as Māori, 6.9 per cent as Pasifika and 9.2 per cent as Asian.<sup>50</sup> Within these broad groupings were over 200 different ethnic groups. Population projections indicate that by 2026 Māori will make up 17 per cent of the population, Asian 16 per cent and Pasifika 10 per cent.
- 2.5 Not only are we now far more ethnically diverse as a nation than 50 years ago, but we are increasingly pluralistic in how we perceive ourselves and our children. For example, one in four children born in 2009 was recorded as having more than one ethnicity.<sup>51</sup> However, some parts of the country are far more heterogeneous than others. Increasingly New Zealand's urban and

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46 Cemeteries Act 1882.

47 Cemeteries Act 1882, s 16.

48 Todd Nachowitz "Quantifying Ethnic and Religious Diversity: Recent Trends and Future Projections" (paper presented to New Zealand Diversity Forum, Hamilton, August 2011).

49 The Office of Ethnic Affairs "Ethnicity Data Online Resource: Demographic Overview" (13 September 2012) < [www.slideshare.net/Ethnicaffairs/ethnicity-data-online-resource-demographic-overview](http://www.slideshare.net/Ethnicaffairs/ethnicity-data-online-resource-demographic-overview) > at 5.

50 Nachowitz, above n 48.

51 Statistics New Zealand "Demographic Trends: 2010" (31 January 2011) < [www.stats.govt.nz](http://www.stats.govt.nz) > .

rural populations are distinguished by their markedly different demographic makeup. Auckland is home to more than 50 per cent of all New Zealand residents of Asian, Middle Eastern, African and South American origin. Taken together, these demographic shifts have significant implications for this review due to the introduction of new belief systems and cultural practices, some of the most important of which concern the rites and rituals associated with death and memorialisation.

- 2.6 A critical policy question arising throughout this Issues Paper is how the law should accommodate these diverse beliefs and practices with respect to the care and final committal of a person's body after they have died. The objective of this chapter is to introduce some of the important cultural and spiritual concepts and practices that are associated with death among the major religious and ethnic groups in this country. As a former New Zealand Race Relations Commissioner has noted, the relationship between religion, culture and ethnic identity is often complex, so policy makers need to avoid simplistic assumptions:<sup>52</sup>

In thinking about the afterlife, for example, a Muslim Malay may have more in common with another Muslim from Iraq than with a Chinese Malay. Likewise, Catholics from Italy and the Philippines will have much common ground, despite their diverging cultures. A New Zealand-born Indian's expectations of a funeral may be quite different from those of a recent migrant from Gujarat or Fiji. Someone who describes themselves as 'non-religious' may have just as many spiritual needs as a devout Christian or Buddhist.

- 2.7 It must also be emphasised that although for many religious and ethnic groups, doctrine may underpin the practices that occur at the time of death, their continued observation today may be less an expression of individual belief and more an expression of shared values and the reinforcement of a common cultural heritage that has provided solace to the bereaved over many generations.
- 2.8 With these caveats in mind, our objective in this chapter is to provide a brief introduction to some of the practices that have been traditionally associated with some of the larger cultural and religious groups who make up our population today. In doing so we have drawn on Margot Schwass's compilation of different cultural approaches to death in New Zealand published in conjunction with the Funeral Directors Association of New Zealand (FDANZ).<sup>53</sup> We also draw on the insights we have gained from a number of different ethnic groups and organisations in the course of our preliminary research and consultation.

## APPROACHES TO DEATH

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- 2.9 Respect for the deceased and a desire to ensure that death is marked in a meaningful and respectful manner are considered to be universal human values. Precisely *how* these values translate into practice and what constitutes a "good death" or a "decent burial" can vary significantly. Religious affiliation can be one of the most influential determinants in these matters.

### Religious affiliation in New Zealand

- 2.10 Of those who answered the "religious affiliation" question in the 2006 census (94 per cent of respondents) around 35 per cent reported that they did not adhere to any religion.<sup>54</sup> A decade earlier the comparable figure was around 26 per cent. Of those answering the question who did

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52 Joris de Bres "Introduction" in Margot Schwass (ed) *Last Words: Approaches to Death in New Zealand's Cultures and Faiths* (Bridget Williams Books, Wellington, 2005) at 8.

53 Schwass, above n 52.

54 Statistics New Zealand "Culture and Identity: Religious Affiliation Census 2006" (2006) < [www.stats.govt.nz](http://www.stats.govt.nz) > .

identify with a religion, 55.6 per cent were affiliated with a Christian denomination (compared with 60 per cent in 2001). Affiliation with a Christian faith was significantly higher among Pasifika, with 80.2 per cent of those who answered the question identifying with a Christian religion.

- 2.11 While the number of New Zealanders formally identifying with a Christian denomination has been in gradual decline for a number of decades, the reverse can be seen in the proportion of the population identifying with other religions, reflecting changing migration patterns. For example, between 2001 and 2006 the number of people affiliated with Hinduism and Islam increased by more than 50 per cent.<sup>55</sup> More than 70 per cent of those affiliated with these two faiths were born overseas. Buddhist and Sikh congregations have also significantly increased.<sup>56</sup> Although many different ethnicities are represented among the one-third of the population recorded as having “no religion”, Pākehā New Zealanders are more likely to have no formal religious affiliation<sup>57</sup> while people identifying with the Middle Eastern, Latin American and African ethnic groupings are significantly less likely to profess no religious ties.
- 2.12 However, researchers in this area urge caution in how data about religious affiliation and church-going is interpreted. Dr Kevin Ward, a lecturer in theology and religion, argues that declining levels of *institutional* religious affiliation among New Zealanders is not necessarily synonymous with a lack of spirituality or belief:<sup>58</sup>

... many of the generation who the figures indicate left the churches in the sixties and seventies, rather than becoming "secular atheists" have been conducting a renewed search for the spiritual. In all of these western countries the pattern seems to be consistent. People have continued to express an interest in things spiritual and religious beliefs have continued to be held by the great majority. Indeed over the past two decades interest in these dimensions appears, if anything, to have increased.

- 2.13 Ward refers to the paradox of a strongly spiritual culture alongside the continued decline in church-belonging in countries like New Zealand. Clearly, views about the spiritual status of human remains and appropriate burial rites are not limited to those formally aligned with an institutional religion

### How beliefs and customs influence our responses to death

- 2.14 Religious belief can provide a common language that sometimes transcends ethnic ties, and vice versa. Rituals and practices within a common belief system may find different expression within different ethnic and geographic communities. In the following discussion we describe some of the important rituals and customs that have traditionally accompanied death within different religious and ethnic communities and the concepts underpinning them. We begin with the moment of death and preparation of the body and end with the various approaches to memorialisation.

#### Care and preparation of the body

- 2.15 In many cultures the moment of clinical death is not thought to immediately sever the spirit from the body. Māori regard the tūpāpaku (body) as tapu (sacred) and tikanga Māori (customary law and practice) applies distinctive rules and principles to the care and custody of the body during the period before burial. Great importance is attached to death and to the deceased, who have special ancestral status and towards whom the living have continued

55 Islam increasing from 23,637 to 36,072 and Hindu from 39,867 to 64,389.

56 At the time of the 2006 census 52,365 people affiliated with Buddhism and 9,507 with Sikhism.

57 At the time of the 2006 census around 38 per cent of those who responded to the question and who identified as European or New Zealander had no religious belief.

58 Dr Kevin Ward “Religion in a Postquarian Age: the Tide is Running Out” (Research paper, Presbyterian Church of Aotearoa, 2007).

- obligations. After death everything around the deceased becomes tapu and the kawa (customs) of the tangihanga are engaged. From the moment of death the deceased is treated as part of the proceedings, and is “cared for, cherished, mourned, spoken to [and] honoured”.<sup>59</sup> Māori believe it is very important that someone remain with the tūpāpaku at all times from the time of death until burial. It is believed that remaining with or near the body and addressing speeches to the person encourages the wairua (spirit or soul) of the deceased to depart the earth.
- 2.16 The need to retain an intimate connection with the body of the deceased from the time of death until after burial or cremation is common to many cultures and religions. Buddhists see death as a process that is not complete until the mind is separated from the body. For advanced Buddhist practitioners the process can take many days or even weeks. During this period, the body is treated with great reverence and care. Many Chinese also believe the soul remains in the body for some period before it is freed on its journey to the afterlife. It is traditional to comfort the deceased with gifts of food and money. Indigenous Fijians also see clinical death as a stage in the separation of the spirit from the body. They, too, will remain with the body until burial occurs. Respect and care for the body is again of utmost importance to those of the Jewish faith and, like Māori, it is seen as important for someone to remain with the deceased until the moment of burial.
- 2.17 There are also many commonalities in how different cultures and religious groups traditionally prepare the body, incorporating rituals and symbols to honour and purify the deceased, and assist them to make the transition from the physical to the spiritual realm. In the Islamic and Jewish faiths it is important that the ritual cleansing and preparation of the body is carried out by members of their own faith community, either in a private home or a facility made available for this to take place. Irrespective of religious or ethnic affiliation, in the not-too-distant past when many people were cared for and died in their own homes, it was not uncommon for close family members to be involved in the washing and laying out of their dead. However, this practice has become less common since the shift towards hospitalisation and institutional care for those in the last stages of their lives.
- 2.18 In New Zealand embalming has become common practice. The embalming process can make it easier for the grieving to spend time with the deceased including, for example, having an open coffin for an extended period at home, on a marae, or in another public place. It may also remove pressure on those making funeral arrangements. However, embalming is by no means a universally accepted practice, particularly among those groups who place importance on a prompt burial and who may consider embalming to be disrespectful to the sacred status of the body. Others may have concerns about the cumulative impact of embalming on the soil and groundwater.
- 2.19 The clothing in which the deceased is to be buried or cremated is also often highly symbolic. In many instances the deceased is dressed in their “best” attire and items of either religious or personal significance placed in the coffin with them. Cook Islanders may cover the body in a special tivaevase, or bedspread. It is traditional within some Indian communities for married women to be dressed as brides and adorned with jewellery. In contrast, adherents of the Jewish and Islamic faiths place the deceased in simple shrouds, symbolising the equality of all people in death.
- 2.20 In the interlude between death and burial or cremation, religious or cultural ceremonies will often be performed, sometimes involving a religious leader. For example, Catholics will often hold a vigil service on the eve of a funeral where a priest will lead the congregation in prayer

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59 H Dansey “A View of Death” in Michael King (ed) *Te Ao Hurihuri, Aspects of Maoritanga* (Reed, Auckland, 1992) at 108.

for the deceased, and mourners may recite a devotional prayer called the rosary. Cook Islanders may also have a less formal and more intimate service on the evening before burial is to take place. In the Hindu tradition, a Brahman may come to the home of the deceased and conduct readings and prayers while the spirit of the dead remains present.

- 2.21 In most cultures it is customary for relatives and members of the community to support the immediate family and to assist in making funeral arrangements. For Māori, for example, it falls to the wider whānau group to prepare for the tangihanga, thus allowing the whānau pani (immediate kinship group) to be immersed in their grief and to care for the tūpāpaku. Traditionally the body is taken to the marae immediately after death to allow the tangihanga to proceed, as the wairua of the deceased is not finally freed from the body until the tangihanga and its rituals have been concluded and the body interred.
- 2.22 Providing food for the mourners and their guests is a practice universal to all cultures, and can place significant burdens on communities where the period of mourning is lengthy and the funeral ceremonies are attended by large numbers. In many Pacific cultures the community will typically express their support for the grieving family through gift-giving ceremonies, which frequently include financial donations. These gifts are often reciprocated at some future date.

### *Farewelling the dead*

- 2.23 The ceremonies that take place immediately before burial or cremation serve a number of different religious and/or cultural functions. For those who believe in some sort of spiritual continuance, the ceremonies are the moment when the final religious rites are performed, ensuring the deceased can pass on to the next life. They are also a way in which different faith and cultural groups reinforce their own beliefs and ties with one another. For many they provide an opportunity to honour and commemorate the life and achievements of the deceased and to acknowledge and comfort the deceased's family and friends.
- 2.24 For Māori the tangihanga is one of the most important and well-attended gatherings and serves both to farewell the deceased and maintain social cohesion. The rituals and practices at tangihanga demonstrate the Māori belief in the continued presence of the dead in the lives of the living. Tangihanga can last several days and mobilise large numbers of people, many of whom travel from far away to participate in the public mourning and farewelling of the deceased. There are rituals of encounter, lamentations, oratory, overt displays of mourning, recitation of genealogy, prayer and speeches of farewell. The body may also be taken to neighbouring marae for further speeches and honouring of the dead.
- 2.25 Fundamental to Māori culture is the belief in the link between land, people and ancestry, which is inter-generational. It is common for tangihanga to include lengthy discussion or debate as to the most appropriate burial location for the deceased. Indeed this is said to be one of the rationale for the tangihanga itself.
- 2.26 Claims for burial in a particular location are usually made on the basis of shared whakapapa between the claiming party and the deceased or other close connections. The claim serves several purposes; the claiming party has a collective interest in burying the deceased in the place that will maintain the continuity of their whakapapa lines and that will reinforce whanaungatanga. Having the deceased in home territory also strengthens the mana of the claiming group by drawing their descendants back to them. The claim also challenges the local hapū to demonstrate that they will properly care for the deceased in their final resting place and will fulfil their ongoing responsibilities. Finally, claiming the body of the deceased is also

necessary to recognise the mana of the deceased or their family. It is considered a compliment and a mark of respect. As noted by Nin Tomas:<sup>60</sup>

Without passionate displays and claims of whanaungatanga and whakapapa to raise the mana of the deceased and proclaim ancestral worth, how can his or her value as part of the community be acknowledged?

- 2.27 In some cultures and religions other customs and rites are considered imperative. For example, both the Islamic and Jewish faiths require burial to take place as soon as possible after death, so the soul can find rest. Jewish funerals usually take place in a chapel at the cemetery rather than a synagogue and involve a simple ceremony after which the congregation accompanies the family to the graveside for burial. A memorial service at a synagogue will often follow. For the Muslim community it is also very important that all arrangements are carried out by others within the same religious community, including carrying the coffin to the graveside.
- 2.28 Chinese funerals will differ depending on the deceased's cultural and religious affiliations, but they will often involve large gatherings with floral tributes and donations to charity. They may be followed by a procession that passes by places of significance to the deceased. Funeral processions between a church and cemetery are also common practice within the Catholic faith.

#### *Final disposition*

- 2.29 For some the decision whether to inter or cremate a body may turn on purely pragmatic issues such as cost and accessibility. However, for others in New Zealand the decision is based on deeply held convictions. In the past, belief in bodily resurrection prevented Catholics and some other Christian denominations from being cremated. This is still the position for some orthodox Jews and Muslims. Even when the initial religious rationale for preferring burial over cremation is no longer adhered to, millennia of practice and strong cultural norms often continue to hold sway. As Schwass notes, some ethnic groups, including those who have migrated from the Horn of Africa, may regard cremation as “not merely unacceptable, but shocking”.<sup>61</sup> For these cultures, as for many Māori and Pacific Islanders, “returning the body of a loved one to the earth is culturally very important”.<sup>62</sup>
- 2.30 Although motivated by ethical rather than religious imperatives, alternative burial options are gaining fresh interest among New Zealanders with strong commitment to sustainability and environmental values. As we discuss in chapter 4, this is resulting in a growing number of requests to local authorities for the establishment of eco or natural burial sites in which bodies are buried without prior embalming and in coffins or shrouds designed to facilitate rapid decomposition.
- 2.31 However, just as cremation may be unacceptable for some, for others this process may constitute an important religious and cultural rite in itself. This is the case for the Hindu community as well as many practitioners of Buddhism. The Hindu rites around death are based on the detachment of the Atma (soul) from the body and the transmigration of the soul from one body to another. Fire allows the soul of the deceased to reunite with the Paramatma or the universal spirit. Traditionally the eldest son would be responsible for lighting the funeral pyre.
- 2.32 Buddhists also believe the death of the body marks a transition to another life stage rather than an end. Many of the customs and rituals performed in the period leading up to and immediately after death are intended to assist the dying person achieve a good re-birth. Many Buddhists

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60 Nin Tomas “Ownership of Tūpāpaku” [2008] NZLJ 233 at 233.

61 Schwass, above n 52, at 98.

62 At 98.

favour cremation, which would traditionally be carried out on an open pyre after the body has been anointed.

### *Human Ashes*

- 2.33 Most people regard human ashes as material to be treated with respect. In some religions and cultures human ashes and bone fragments are regarded as sacred and strict protocols govern how they are handled. In some instances these protocols relate to the manner of dispersal; in others, to how and where they are stored. For Indians of the Hindu faith it was traditional to release the ashes of the deceased into the waters of the Ganges. Here in New Zealand many Hindus wish to be able to release the ashes into flowing water, as this is connected with freeing the spirit of the deceased. Storing ashes in an urn in the home is repellent to many Hindu. In other cultures it is important that bone fragments can be obtained from the cremains (the bone fragments and material that are left after cremation) as these constitute sacred relics which may be placed in a shrine to the deceased.
- 2.34 There is a similarly broad range of practices among Christians and those of no specific religious beliefs. In some instances ashes are never retrieved from the cremation authority; in others they may be formally interred in a public cemetery or on private property. It is also common for family members to scatter ashes at sea or in other waterways. Typically the disposal of ashes in public places is unregulated. In some instances it may breach local bylaws as well as give rise to cultural offence.<sup>63</sup>

### *Memorialisation*

- 2.35 The period of mourning and the rites and customs associated with it are just as varied as the processes leading up to the final committal. For Māori the unveiling of the gravestone may take place a year or longer after burial. In many cultures the gravesite continues to be an important focus for mourners and offerings of food and other symbolic gifts may be left there to aid the deceased on their journey. Rituals associated with the deceased may continue on specified days for many months. In the Jewish faith the first stage of the formal mourning period, or shiva, lasts seven days during which time the soul is believed to be still separating from the body. A year later the soul is elevated to heaven; special prayers and the unveiling of a tombstone may mark this occasion. The Chinese may also mark the end of the formal mourning period with a family banquet. In contrast, adherents of the Islamic faith try to limit the period of mourning to a few days, as resuming normal life after a death is seen to be an expression of confidence that the deceased has gone to a better place.
- 2.36 In many faiths the dead will often be remembered on specific days where family members usually attend to the graves of their loved ones.

## **IMPLICATIONS FOR OUR REVIEW**

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- 2.37 This discussion illustrates the ways in which culture and religious or spiritual convictions influence the way death is approached by different groups in society. In some cases these beliefs can give rise to obligations that have equal moral weight for the followers of these belief systems, as would duties imposed by legal rules.
- 2.38 For some, failure to comply with certain rituals or practices can be thought to result in harm not only to the deceased but also to their surviving relatives. For others the rituals and customs

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<sup>63</sup> For example, many Māori believe human remains, including ashes, are tapu and should not be intermingled with rivers and waterways, particularly near food sources or other human activities.

- at the time of death may no longer be imbued with religious significance but may still provide an important collective cultural framework within which to approach death.
- 2.39 In our view, as a matter of principle, it is important that any reform of New Zealand’s burial law makes adequate provision for these different religious and cultural constructs of what constitutes a decent burial. On the face of it, section 6 of the Burial and Cremation Act would seem to provide for such diversity in burial. However, as we discuss in Part 2, in reality this expansive provision can be constrained by the far more restrictive and prescriptive bylaws and rules imposed by those who currently manage and control New Zealand’s public cemeteries and the constraints on who may establish new places of burial.
- 2.40 There are, of course, other relevant interests at play in this area of law. For example, the need to respect cultural diversity must be balanced against the need for access to affordable burial options for the whole community and the need to ensure that the practices associated with death and final disposition do not cause offence or create a public health risk.<sup>64</sup>
- 2.41 Alongside these pragmatic considerations the law must also address how best to resolve disputes that may arise when there is a clash between the belief systems and cultural affiliations of those responsible for the deceased after death. Given the strength of beliefs and emotions associated with death distressing and intractable conflicts can result. It is possible that such conflicts will arise with greater frequency in the future as a result of marriage (and re-partnering) between couples from different cultures and religions.
- 2.42 This review provides the first opportunity for New Zealanders to discuss these issues and to express their views about what constitutes a “good death” and a “decent burial” and how the law can help resolve disputes when values and traditions are in conflict.

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<sup>64</sup> The rights to religious freedom and of minorities protected by the New Zealand Bill of Rights Act 1990 are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (s 5).



## Part 2

# BURIAL AND CREMATION: THE ADEQUACY OF THE LEGAL FRAMEWORK



LAW • COMMISSION  
TE • AKA • MATUA • O • TE • TURE

# Chapter 3

## A brief history of our burial and cremation law

### INTRODUCTION

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- 3.1 In order to understand the legal and cultural frameworks within which burial takes place today it is helpful to briefly review the history of burial and cremation in this country and the various cultural, economic and social forces that shaped it.
- 3.2 Cemeteries and burial grounds are a prominent feature of our landscape. In the country's major cities large public cemeteries, such as Auckland's historic Symonds Street Cemetery, Wellington's Bolton Street Cemetery and Christchurch's Barbados Street Cemetery, speak of a time in history when the living made a place for the dead close to their growing urban centres. The countryside is also the repository of thousands of urupā, country cemeteries and church burial grounds. Some remain open for burials and the interment of ashes; many others are closed and in varying states of neglect.
- 3.3 Under the Burial and Cremation Act 1964 (the Act), a cemetery is defined as "any land held, taken, purchased, acquired, set apart, dedicated, or reserved, under the provisions of any Act or before the commencement of this Act, exclusively for the burial of the dead generally". In contrast, a denominational burial ground is defined as "any land, outside the boundaries of a cemetery, held, purchased, acquired, set apart, or dedicated, under the provisions of any Act or before the commencement of this Act, for the burial of the dead belonging to 1 or more religious denominations."<sup>65</sup> This is an important distinction in our burial law, and has existed since our foundational burials law, the Cemeteries Act 1882. It is a distinction that is relevant to much of the discussion in this Part of the Issues Paper.
- 3.4 This mixture of public and private, secular and religious, historic and contemporary places for human burial is a reflection of both our indigenous and our colonial history. It is also a product our early legislators' attempts to provide some sort of orderly legal framework for the provision and management of burial and cremation services.
- 3.5 In this chapter we begin with brief accounts of how Māori and Europeans approached these issues, and the context in which New Zealand's earliest burial law evolved. We then revisit the drivers and objectives behind the statutory reforms, which were enacted by Parliament in the Act and set out the Act's key provisions. Throughout this chapter we draw extensively on the research of Otago University historian Stephen Deed whose 2004 thesis on the development of the cemetery in 19th century New Zealand has been an invaluable resource.<sup>66</sup>

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<sup>65</sup> Burial and Cremation Act 1964, s 2.

<sup>66</sup> Stephen Deed "Unearthly Landscapes: The Development of the Cemetery in Nineteenth Century New Zealand" (Masters of Arts thesis, University of Otago, 2004).

## TE ORANGA MUTUNGA

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- 3.6 Death and the rituals surrounding it have held a central place in the culture of Māori since their migration to Aotearoa New Zealand. Like all societies, the rituals and practices associated with death were shaped by both spiritual and pragmatic realities. Then, as today, the remains of the dead were regarded as tapu. In his study of early Māori burial customs, historian R.S. Oppenheim describes how the concept of tapu was reflected in the rituals that developed around the handling of one's relatives.<sup>67</sup>
- Bones were the visible remainders of the dead, but they were dangerous reminders; more than sacred relics to be revered, they were by their very nature capable of causing death or misfortune to the living.
- 3.7 The concept of tapu was also intrinsically linked with the level of mana attached to the person in life. This in turn was reflected in the elaborateness of the tangihanga that followed death and ultimately the disposition of the human remains. Burial practices varied between different iwi and in response to different geographical and sociological conditions. However, anthropologists believe that after the tangihanga the dead were commonly buried in relatively shallow graves on the perimeters of settlements. These burial grounds, known as urupā, were regarded as wāhi tapu, where human activity was controlled by strict protocols and prohibitions, reflecting both the sacred status of the dead and also the risk their presence could pose for the living.
- 3.8 In common with a number of Polynesian societies it was also a custom, often reserved for high ranking Māori, to later reinter the cleaned bones in secret burial places where they were safe from desecration by war parties or tribal enemies. The presence of the ancestral remains was critical to both preserving the connection between the living and the spirits of their ancestors and cementing the tribe's status as tangata whenua.<sup>68</sup>
- 3.9 Permanent settlement and the absence of inter-tribal warfare allowed for the visible commemoration of the dead in the forms of canoe cenotaphs, and elaborately carved mortuary houses known as papa tūpāpaku were built to contain the bodies of high ranking individuals during the first cycle of grieving and before permanent interment. A notable example was the elaborate four metre high mausoleum constructed at Raroera Pa to house the remains of Tainui leader Te Wherowhero's daughter. High ranking Māori were also commemorated through the creation of wāhi tapu used as repositories for clothes and tapu objects belonging to the dead.
- 3.10 Stephen Deed points to the importance of rural marae and their associated family urupā to the preservation of tikanga Māori throughout the tumultuous period of colonisation and land alienation. The tangihanga and urupā continue to play a pivotal role in modern Māori society. Like all cultural practices, however, Māori burial traditions have evolved and adapted in response to such influences as Christianity and the increasing urbanisation of the Māori population.<sup>69</sup> The establishment of Mission stations and rapid adoption of some form of Christianity by many iwi during the 1830s and 1840s saw some changes in burial practices, including a falling away of the practice of exhumation and re-interment, although the fundamental elements of the tangihanga remained intact.
- 3.11 In the contemporary context urupā are given legal protection within our legal framework under Te Ture Whenua Maori Act 1993. This Act sets out the powers of the Māori Land Court and establishes a range of administrative structures for application to different land uses. Among

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67 R S Oppenheim *Maori Death Customs* (Reed, Wellington, 1973) at [24].

68 See ch 14 for detailed discussion of tikanga Māori and death.

69 Deed, above n 66, at [57].

these, section 338 sets out the provisions for the establishment of Māori reservations. Like cemeteries and recreational reserves set aside by the colonial government, these reservations were intended for communal purposes such as marae and urupā. Te Ture Whenua Maori Act allows for any land of special significance to Māori to be designated as a reserve. The land cannot be alienated except with the approval of the court and with respect to wāhi tapu sites the trustees can impose whatever restrictions necessary to protect the tapu status of the site.

## EARLY PĀKEHĀ BURIAL PRACTICE AND LEGAL RESPONSES

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### Burial

- 3.12 Although enacted in 1964, the Burial and Cremation Act is an iteration of a much older Act passed by the young colony's General Assembly nearly 130 years ago: the Cemeteries Act 1882.
- 3.13 The provision of cemeteries in New Zealand began on an ad-hoc basis, responding to the rapid increase in population following the signing of the Treaty of Waitangi in 1840. Between 1851 and 1871, New Zealand's Pākehā population grew from almost 27,000 to 255,000.<sup>70</sup> The provision of places of burial was a necessity that could not wait for a tidy legal framework, and so early legislation responded to the situation that had developed in the absence of legal controls.
- 3.14 The planned townships established by the New Zealand Company (including Nelson, New Plymouth and Christchurch) often included provision for public cemeteries.<sup>71</sup> Provincial councils and private individuals also purchased and set aside reserves for cemeteries and churches, and mission stations often established burial grounds to serve their communities. Cemeteries were established in small settlements, as the need arose, and were managed by voluntary trustees. This mirrored the Māori approach to urupā, which tended to be intimate and closely connected with a particular marae. Indigenous burial customs continued throughout this period, adapting to the tenets of Christianity in areas influenced by missionary activity. Although the Church of England was a powerful influence within the settler society, and early mission stations often developed small burial grounds in the surrounds of the church, there was no tradition of parish graveyards and burials.
- 3.15 The situation was characterised by a spirit of practicality and community-mindedness, if not extensive foresight or strategic planning. Until 1874, there was no nationally applicable law governing the establishment or management of cemeteries and burial grounds, and different provinces adopted different approaches. Our first burials statute was the Burial-Ground Closing Act 1874, and it is telling that the proliferation of small cemeteries and burial grounds was seen as a more pressing issue than the management of structures for places of burial. The Cemeteries Management Act 1877 established the roles and powers of cemetery trustees, and included provision for separate denominational areas in public cemeteries. However, this Act was not to endure and in 1882, responding to the uncertainty about where responsibility lay for the provision of cemeteries, the General Assembly decided to enact consolidating legislation: the Cemeteries Act 1882.
- 3.16 The Cemeteries Act 1882 required local authorities to provide cemeteries, where there was a need, and established a uniform legal framework under which all cemeteries and burial grounds were to be managed. The principles underlying the 1882 Act were themselves strongly influenced by the reforms in English burial practices which took place under the Metropolitan Interments Act 1850. The Metropolitan Interments Act established the primacy of public health

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70 Jock Phillips "Further information - British and Irish immigration" (20 December 2012) New Zealand History Online < [www.nzhistory.net.nz](http://www.nzhistory.net.nz) > at ch 3.

71 Deed, above n 66, at [87].

- interests in England's burial law and overturned the centuries-old practice of burial within the parish, replacing it with an obligation on municipal councils to provide public cemeteries. This reform was a response to the cholera outbreaks in London and other urban centres from 1831 to 1854.<sup>72</sup>
- 3.17 The Cemeteries Act adopted the same broad approach as the Metropolitan Interments Act, including establishing the primacy of local authorities in the provision of cemeteries:<sup>73</sup>
- It shall be the duty of every local authority to provide a suitable cemetery for the interment of the dead where sufficient provision is not otherwise made for that purpose, or where under the powers contained in this Act such cemetery shall have been closed.
- 3.18 The Cemeteries Act also allowed for areas to be set aside in public cemeteries for the use of a particular religious denomination.<sup>74</sup> The control of these areas was to be exercised by religious officials, consistent with the approach taken under the Metropolitan Interments Act granting Bishops of the Church of England and the Church of Ireland authority over the consecrated portions of public cemeteries.
- 3.19 As well as clarifying where responsibility for the provision of cemeteries and denominational areas lay, the 1882 Act addressed concerns about the proliferation of small cemeteries and the lack of any form of management framework.<sup>75</sup>
- 3.20 Although the 1882 Act made local authorities the default provider of public cemeteries, it retained provisions for the management of cemeteries by trustees.<sup>76</sup> It did, however, change the management framework for these cemeteries, extending the level of central oversight. These were no longer private arrangements, but rather quasi-public forms of devolved management, with trustees appointed by the Governor-General. Local authorities could be appointed as trustees as well as operate cemeteries on their own account. New cemeteries managed by trusts continued to be established, generally with the full support of the local authority.<sup>77</sup>
- 3.21 In line with England's move to prevent bodies being buried in close proximity to heavily populated areas, the 1882 Act prohibited the establishment of any cemetery inside the city boundary. However, this prohibition came too late for a number of provinces which by 1882 had already established large public cemeteries on land that was initially on the fringe of the new urban centres. This included Auckland's Symonds Street Cemetery, which was opened in 1842, and Wellington's Bolton Street Cemetery, which was set aside as a burial reserve by Governor Hobson in 1841.
- 3.22 As Stephen Deed observes in his thesis, although these early cemeteries reflected the secular and egalitarian ideals of the new colony, in practice the development of many early cemeteries was strongly influenced by religious and ethnic divisions:<sup>78</sup>

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72 A legal commentary on the Act written by London barrister St William Cunningham Glen Esq. *The Metropolitan Interments Act 1850: Introduction, Notes and Appendix* (Shaw and Sons, London, 1860) described the circumstances which gave rise to the new statute in the following passage:

The injurious effects, moral and physical, produced by the practice of interring the bodies of the dead in burial grounds surrounded by the habitations of the living, as well as in churches and chapels, and the scenes of revolting desecration and profanation of the graves and remains of the dead which were frequently witnessed in the crowded burial grounds of London ...

73 Cemeteries Act 1882, s 38.

74 Section 28.

75 See for example, Cemeteries Act 1882, ss 23-27.

76 Section 6.

77 For example, on 9 October 1886 it was reported in *The Colonist* that a public meeting had been held and trustees nominated for a new public cemetery at Stoke, with the names to be forwarded to the Government for approval and Gazetting. See "Public Meeting at Stoke" *Colonist* (Nelson, 9 October 1886) at 5. For the article, see < [www.paperspast.natlib.govt.nz](http://www.paperspast.natlib.govt.nz) > .

78 Deed, above n 66, at 72.

Although they may not have been governed by an established church, and were often created and maintained by municipal authorities, New Zealand's cemeteries were far from non-religious in character. Rather, with no established church, the New Zealand cemetery was capable of expressing religious affiliation and diversity in a way in which the exclusively Anglican churchyards of Britain never were [could]. Ethnicity and religion were closely connected, which meant sectarian divisions could often roughly equate to ethnic divisions.

- 3.23 For example, by 1851 Wellington's Bolton Street Cemetery was in effect operating as three distinct cemeteries, allowing for a choice between interment in consecrated or un-consecrated land. One area was reserved for Church of England burials, one for "non-conformists" and a third for the Jewish community.<sup>79</sup> Catholics were buried in consecrated ground in the Mount Street Cemetery. This duality between secularism and religious affiliation went on to be enshrined in our early cemeteries legislation and, indeed, continues as a defining feature of the current law.

### Cremation

- 3.24 The Burial-Ground Closing Act 1874 established the right of any person "by will or deed duly executed, to direct that his or her body shall be disposed of by burning the same to ashes instead of by burial in the earth".<sup>80</sup> However, it was not until 1895 that the Cemeteries Act was amended to give the trustees of any cemetery, including those established by local authorities, the power to make provision for cremation and to build crematoria.<sup>81</sup>
- 3.25 At the turn of the century advocates of cremation organised themselves into cremation societies to lobby for better public and political acceptance of cremation as an alternative to burial. In 1903 the Dunedin Cremation Society published a tract making the case for cremation over traditional interment. They argued that cremation removed the public health risks associated with the interment of those whose deaths resulted from infectious diseases such as measles, scarlet fever and typhoid.<sup>82</sup>
- 3.26 Wellington was the first local authority to respond to the public demand for crematoria and make use of its power to establish a crematorium. In 1909 the City Council opened New Zealand's first crematorium in the grounds of the city's new public cemetery, which the council had established in 1891 on the outskirts of the city in Karori. However, it was another four or five decades before other local authorities around the country began investing in building crematoria. In contrast to cemeteries, which local authorities were required to provide, there was (and is) no obligation to provide crematoria; nor has there ever been a prohibition on private crematoria, though until relatively recently cost barriers have significantly limited private provision.
- 3.27 Acceptance of cremation as an alternative to burial increased gradually throughout the 20th century, although it remains unpopular for some religious and ethnic groups. As discussed, the early burial laws made explicit provision for a person to elect cremation. However, the law also recognised the risks created by a means of disposal that rendered the human body to ash, so special regulations were introduced setting out the approvals and processes that were required before a cremation could be authorised.

79 At 72.

80 Burial Ground Closing Act 1874, s 14.

81 Amendment (Cremation) Act 1895.

82 Deed, above n 66, at 106.

- 3.28 The Cremation Regulations were first introduced in 1928 pursuant to the Cemeteries Act 1908.<sup>83</sup> The regulations established a system of medical referees who were required to audit the application for cremation and the accompanying medical certificate to ensure there was nothing suspicious about the death. As noted in our earlier Issues Paper on death and cremation certification, the regulations governing cremation have been amended in only superficial ways since these 1928 regulations came into force.<sup>84</sup>

## THE BURIAL AND CREMATION ACT 1964

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### The provision of cemeteries and burial grounds

- 3.29 At the time of the introduction of the Burial and Cremation Bill in 1964 the then Minister of Health the Hon D McKay noted that many of the provisions of the existing statute, the Cemeteries Act 1908, had “stood unaltered from the form in which they were enacted in 1882”.<sup>85</sup> But while there may have been a sense that the law needed to be modernised, records of Parliamentary debates indicate that, rather than significantly reforming the cemetery sector, the objectives of the new Act were to further entrench the responsibilities and powers of local authorities, to the exclusion of other providers (with the exception of religious groups).
- 3.30 The Hon Mr McKay told his colleagues the objective of the new Bill was to “ensure that as far as possible burials should take place in cemeteries under the control of local authorities”.<sup>86</sup> Under the old statute local authorities managed many cemeteries as trustees, appointed by the Governor-General. Under the new Act control and management of cemeteries was to be exercised in the local authorities’ own right.
- 3.31 Most significantly, under the new law, it would no longer be possible for new public cemeteries to be established by other providers. Existing trustee-managed cemeteries would continue to function but mechanisms would be introduced to facilitate the transfer of these cemeteries to the management and control of local authorities over time. In practice, we know of no trustee-managed cemeteries established after the legislation was consolidated in 1908.
- 3.32 Denominational burial grounds, which were intended to meet the needs of religious orders continued to be provided for under the new Act. A new provision was introduced allowing any denominational group that had been declined the right to establish a denominational area within a public cemetery to appeal the decision to a District Court Judge.<sup>87</sup> In theory, this provision could be used to protect the interests of such groups if local authorities adopt plans or policies that do not support the concept of separate religious areas.<sup>88</sup>

### Responsibility for maintenance

- 3.33 The Parliamentary debates on the Bill suggest the issues of most pressing concern at the time related primarily to maintenance and the extent to which the primary legislation should dictate to local authorities such matters as the style of cemetery and type of memorialisation made available to the public. At time of the Bill “lawn cemeteries”, which comprised large tracts of lawn with gravesites indicated by small inset plaques, were being promoted for their park-

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<sup>83</sup> This Act consolidated amendments to the Cemeteries Act 1882.

<sup>84</sup> The reform of certification was considered in an earlier Issues Paper: Law Commission *Final Words: Death and Cremation Certification in New Zealand* (NZLC IP23, 2011).

<sup>85</sup> (22 October 1964) 340 NZPD 2908.

<sup>86</sup> At 2909.

<sup>87</sup> Burial and Cremation Act 1964, s 11(2).

<sup>88</sup> As we discuss in ch 4 this trend has in fact occurred but we are unaware of any case where a decision to decline an application to establish a denominational area within a public cemetery has been challenged in the District Court.

like qualities and the ease with which they could be maintained. Maintenance standards of cemeteries as a whole, and old monuments in particular, were a source of particular concern as noted in the following extract from the debate in the House during the Bill's first reading.<sup>89</sup>

...over the years local authorities throughout New Zealand have been experiencing increasing difficulty in maintaining cemeteries in a tidy condition. For many local authorities it has become a major headache, and it will become increasingly so as the country becomes older and we have cemeteries with a large proportion of very old graves in them.

- 3.34 These concerns were reflected in a number of new provisions in the Bill giving local authorities wide powers to tidy and clear closed or otherwise disused or derelict cemeteries or other places of burial. These powers extended to “renovating or removing and disposing of monuments and tablets.”<sup>90</sup> The Minister was also able to close and approve the clearance of cemeteries and burial grounds, including the disposal or removal of monuments and tablets and the levelling and planting over of the area.<sup>91</sup>
- 3.35 In addition to these discretionary powers, and in response to concerns about the risk unstable monuments posed to children playing in public cemeteries, a new provision was introduced requiring local authorities to make safe, take down or remove any monument or tablet which in its view posed “a danger to persons frequenting or working in the cemetery”.<sup>92</sup> The Act does not specify how this is to occur, and some local authorities meet this obligation through fencing off unsafe monuments rather than undertaking repairs, examples of which can be seen in Wellington’s Karori cemetery.
- 3.36 Alongside these largely operational changes, the Act also gave local authorities new powers to deal with graves that had been pre-purchased but where no burial had taken place. In such circumstances the council could either contract with the person who had purchased the right to burial to buy back the plot for an agreed sum or, if 60 years had passed since the sale was made and no burial had occurred, the right to burial would simply lapse.<sup>93</sup>

### The Act’s structure and key provisions

- 3.37 The 1964 reforms did not amount to a first principles review of burial law. Except for the policy shift entrenching local authorities as the sole providers of public cemeteries, the structure, provisions and language of the 1964 Act bear strong similarities to the earlier statutes.
- 3.38 Like earlier legislation, the Act preserves the historic distinctions between “cemeteries” and “burial grounds.” Urupā are explicitly excluded from the Act. While most of the provisions of the Act apply to both cemeteries and burial grounds, there continue to be significant differences in the legal obligations and constraints that are imposed on those managing denominational burial grounds as opposed to public cemeteries. One of the most significant of these, as we will discuss later, relates to the general prohibitions on the sale or alienation of land used for human burial.
- 3.39 The Act also preserves the historic distinction between cemeteries owned and controlled by local authorities and those under the control of trustees and religious denominations. Again, while many of the powers and obligations created under the Act apply to all those in charge of places of burial, some apply only to trustees or burial ground managers. Part 3 of the Act,

89 (22 October 1964) 340 NZPD 2917.

90 Burial and Cremation Act 1964, s 20

91 Section 45.

92 Section 9(h).

93 Section 10(3) and (4).

which deals with Trustees, contains a number of provisions designed to facilitate the transfer of cemeteries under the control of trusts to local authorities. We analyse these in chapter 6.

- 3.40 In the following chapters we assess how well this legal framework is working after nearly half a century. In the next section, we provide a more detailed description of the key legal provisions before moving on to describe in chapter 4 how these provisions are operating from the perspective of the main providers of burial places in New Zealand.

## THE LEGAL FRAMEWORK

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### Key provisions

- 3.41 Other than in exceptional circumstances, the Act prohibits the burial of human remains in any place other than a “cemetery or a denominational burial ground or a private burial ground or a Māori burial ground if there is a cemetery or any such burial ground within 32 kilometres of the place where the death has occurred.”<sup>94</sup>
- 3.42 The Act’s provisions focus chiefly on providing a legal framework within which local authorities and others who are in control of cemeteries or burial grounds must work in order to protect key public interests, including:
- ensuring that human burial takes place in a timely and dignified manner and does not pose either immediate or long-term health risks, or cause offence to individuals or communities;
  - ensuring that deaths are properly certified and where necessary investigated before burial or cremation;
  - providing a mechanism by which religious convictions can be accommodated within a secular framework; and
  - ensuring that land which has been used for human burials is appropriately managed and protected in perpetuity.
- 3.43 As discussed in chapter 2, except for the general prohibition on burial in private land, the primary legislation places very few constraints on the manner in which bodies are to be interred.<sup>95</sup> However, in practice, a raft of bylaws and rules govern every aspect of burial in New Zealand: from the cost and time of interment to who may prepare and in-fill a grave, and the type of memorialisation permitted.
- 3.44 Some of these constraints are a result of other legislation, including for example the Health and Safety in Employment Act 1992, which creates obligations on councils (and others) to ensure the safety of all those entering council-controlled premises.<sup>96</sup> However, many of the constraints derive from council bylaws and rules made pursuant to either the Local Government Act 2002 or the Burial and Cremation Act itself. The Act gives local authorities wide discretionary powers over and responsibilities for its cemeteries, including:
- the exclusive responsibility for the control and management of all cemeteries;<sup>97</sup>

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94 Burial and Cremation Act 1964, s 46. Under clause 80(1) of the Cemeteries Act 1908 the prescribed distance was five miles. Over time the distance has been updated but it is unclear whether there is any empirical basis to the 32 kilometre rule or what percentage of the population could satisfy this criterion, with respect to the distance of their private dwelling from a public cemetery.

95 Burial and Cremation Act 1964, s 6 states “[s]ubject to the provisions of this Act, every cemetery shall be open for the interment of all deceased persons, to be buried with such religious or other ceremony, or without any ceremony, as the friends of the deceased think proper.”

96 Health and Safety in Employment Act 1992, s 16.

97 Burial and Cremation Act 1964, s 5.

- powers to determine all aspects of a cemetery’s structure and adornment, including the size and type of graves, monuments, and vaults, among other things;<sup>98</sup>
  - the right to sell either in perpetuity or for a limited period the right of burial in either the cemetery or vault;<sup>99</sup>
  - a discretionary power to set aside portions of the cemetery for the exclusive use of different religious denominations;<sup>100</sup>
  - a discretionary power to set aside for the burial, without fee, of members of Her Majesty’s Forces;<sup>101</sup>
  - a discretionary power to permit the burial or cremation, free of charge, of a poor person or a person who has died in a state institution;<sup>102</sup> and
  - the right to make bylaws governing all aspects of the management of its cemeteries.<sup>103</sup>
- 3.45 Alongside these rights and responsibilities the Act also places certain constraints on how local authorities exercise their powers, most notably with respect to the management of cemetery finances and any activities that involve clearing, closing and disposing of land that has been set aside for the burial of the dead. Most significantly, section 21 of the Act forbids local authorities from selling or making use of any land comprised in a cemetery for any other purpose.
- 3.46 Section 11(1) of the Act gives local authorities the power to permanently set aside a portion of a public cemetery for the exclusive use of “any religious denomination.” The Act also provides for the development of such an area at the expense of the religious denomination and confers broadly defined rights on ministers and practitioners of the religion to regulate the “performance of any religious ceremony in the burial of the dead” and the “inscriptions on any monuments.”<sup>104</sup>
- 3.47 Section 31 of the Act allows privately owned land to be set aside for the exclusive burial of members of a religious denomination. As well as satisfying public health requirements and any applicable planning consent, applicants must provide evidence that not less than 25 of the adult adherents of the religious denomination support the establishment of the burial ground. Section 31 also allows managers of denominational burial grounds to permit the burial of any other person that they see fit.
- 3.48 The Act also establishes a range of activities that require Ministerial authority before they can be undertaken by either local authorities or other entities with the control and management of cemeteries and burial grounds. The powers of authorisation have been delegated to ministerial officials. These activities include:
- changing the name of a cemetery;<sup>105</sup>
  - closing cemeteries and burial grounds;<sup>106</sup>

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98 Section 9.

99 Section 10.

100 Section 12.

101 Section 15.

102 Section 49.

103 Section 16. We also note that Standards New Zealand has prepared a model cemeteries bylaw, see New Zealand Standards Council NZS 9201.14 (1999).

104 Section 13(2). Under s 13(3) local authorities are specifically prohibited from making any bylaws or taking any other action which interferes directly or indirectly with these rights.

105 Section 7(2).

106 Section 41.

- clearing closed cemeteries and burial grounds;<sup>107</sup>
  - disposing of all or part of any closed burial ground;<sup>108</sup>
  - establishing a crematorium;<sup>109</sup>
  - re-opening a cemetery or burial ground;<sup>110</sup>
  - permitting the burial of a person in a special place other than a cemetery or burial ground;<sup>111</sup> and
  - permitting the establishment of a private burial ground for the exclusive burial of members of a religious group.<sup>112</sup>
- 3.49 The Act sets out a parallel set of rights and responsibilities for cemeteries under the control of trustees. Many of the provisions mirror those that apply to local authorities, such as setting out how trustees are to conduct their business, including their finances. It also creates strict controls over the appointment and removal of trustees and establishes mechanisms whereby the management of trustee-managed cemeteries can be transferred to local authorities.
- 3.50 Part 5 of the Act deals with the establishment of crematoria and outlines the powers and responsibilities of crematorium authorities, which may be a local authority or a private individual, with respect to the operation of crematoria.
- 3.51 Finally, the Act describes the legal obligations on those responsible for arranging the burial, cremation, or disinterment of a deceased person, including:
- a requirement to obtain a doctor's certificate or a coroner's authorisation before disposing of a body;<sup>113</sup>
  - a requirement that a body be disposed of within a reasonable time;<sup>114</sup>
  - a requirement that all burials are properly registered;<sup>115</sup> and
  - a requirement to obtain a licence from the Minister of Health before the removal of any human remains from their burial place.<sup>116</sup>

### *Other enactments and regulations*

- 3.52 Two sets of regulations have been made under the Act: the Cremation Regulations 1973 and the Burial and Cremation (Removal of Monuments and Tablets) Regulations 1967.
- 3.53 The first of these, the Cremation Regulations, describes the obligations on those operating crematoria, including the certification and approval regime that must be complied with before cremation can take place. These regulations also cover the disposal of human ashes.
- 3.54 The objective of the regulations regarding the removal of monuments is to ensure authorities follow a suitably open process and, in particular, that appropriate efforts are made to notify

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107 Section 45.

108 Section 45(3)(a). Note that in contrast, a closed cemetery cannot be sold or diverted in any way.

109 Section 38(2).

110 Section 45A.

111 Section 48.

112 Section 31.

113 Section 46AA

114 Section 46E.

115 Section 50.

116 Section 51.

interested parties, including the relatives of anyone whose grave may be affected by removal work.

- 3.55 Over and above these two sets of regulations a significant number of other statutes either interface with the Act, or, in some cases, duplicate provisions contained in the Act. The most significant of these are:
- the Health Act 1956 and the associated Health (Burial) Regulations 1946 and Health (Registration of Premises) Regulations 1966;
  - the Local Government Act 2002;
  - the Resource Management Act 1991;
  - the Reserves Act 1977; and
  - the Historic Places Act 1993.
- 3.56 An important issue highlighted in our terms of reference was to consider the extent to which the provisions of the Act are either in conflict with, are duplicated in, or have been eclipsed by provisions in these statutes and regulations, many of which have been enacted since the Act was passed in 1964.
- 3.57 Allied to this, we must also consider whether the Ministry of Health remains the most appropriate ministry to administer the Act given the very significant number of non-health related provisions in the Act. These provisions include very many relating to land use and the cultural and historic interests in the preservation of sites used for burial.
- 3.58 We return to these issues in subsequent chapters, but we now turn to describing how the sector is currently operating, beginning with an overview of the main providers and then turning to some of the emerging issues. As mentioned earlier, although local authorities dominate the sector, a range of providers continues to be involved, including trusts that run cemeteries and some residual church involvement in the provision of places for burial.

## INFORMATION, REGISTRATION AND RECORD-KEEPING

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- 3.59 An important aspect of cemetery and crematoria management is the management of information and record-keeping. Some specific provisions about the keeping of official registers are applicable, which we outline below. These requirements specify the information that is to be kept and the access that must be provided to it. The issues relating to information capture through the death certification process have been separately canvassed in an earlier Issues Paper.<sup>117</sup>
- 3.60 The deaths register under the Births, Deaths, Marriages, and Relationships Registration Act 1995 (BDMRR Act) is a central public register managed by the Registrar of Births, Deaths and Marriages within the Department of Internal Affairs. One of the prescribed details to be included on a person's death certificate is the date and place their body was buried, cremated, or otherwise disposed of.<sup>118</sup> Public registers relating to burial information are also kept by individual cemeteries.<sup>119</sup>

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117 *Final Words: Death and Cremation in New Zealand*, above n 84.

118 Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995, reg 7(a)(xv). In relation to cremation, "disposal" is defined in reg 2(1) as the cremation itself, not the putting or scattering of ashes in any place.

119 See Law Commission *Public Registers, Review of Privacy Stage 2* (NZLC R101, 2008) at [2.24].

3.61 Aside from their statutory obligations, as a matter of practice, cemeteries need to have information systems in place to record plot sales and the reservation of particular plots before burial. Cemeteries and crematoria must also handle information requests from funeral services providers and members of the public. These information requests may relate to a particular burial or cremation, or, where the cemetery or crematorium is a public entity such as a local authority, may relate to operation and compliance.

### Deaths register

3.62 The preservation and availability of information about a person's death is governed by the BDMRR Act.<sup>120</sup> Part 6 of this Act requires every death in New Zealand to be registered within three working days after the burial or cremation.<sup>121</sup> After disinterment, the Registrar is to be notified within five working days of where and how the body was subsequently disposed.<sup>122</sup>

3.63 Public access to information on the registers is governed by Part 9 of the BDMRR Act. A distinction is made between historical records and non-historical records. Historical records relate to deaths that occurred 50 years ago or more, or where the deceased's date of birth was 80 years ago or more.<sup>123</sup> The Act allows the Registrar-General to make certain historical information available to the public on the internet.<sup>124</sup> Non-historical information relating to a person's death must be requested, with the person making the request providing evidence of their identity.<sup>125</sup>

### Burials registers

3.64 Information relating to a person's burial is also governed by the Burial and Cremation Act. Section 50 regulates the record keeping of burials within cemeteries by local authorities:<sup>126</sup>

(1) All burials within any cemetery shall be registered in a register to be provided and kept for that purpose by the local authority and in such register shall be distinguished in what parts of the cemetery the several bodies are buried, and a proper description of every grave shall be given, so that the situation thereof can be ascertained, and such register shall be indexed, so as to facilitate searches for entries therein.

(2) Every register shall be open for inspection at all reasonable times, at some convenient place, upon payment of a fee of 5 shillings for every such inspection.

3.65 This obligation extends to cemeteries operated by trusts, but it appears that records are not consistently passed on by trustees (or followed up by local authorities). All of the trustees that managed cemeteries that responded to our Cemetery Trustees Survey confirmed that they retained yearly records of burial.<sup>127</sup> Most had a complete set of records in hard copy, although some noted that historical records have been lost over time.

3.66 The register does not relate to plot sales information, only to records of burials that have taken place. Most local authorities provide online access to burial records, but as noted above, there is

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120 Provisions relating to death certification that originally were located in Part 6 of the Births, Deaths, Marriages, and Relationships Registration Act 1995 were shifted to Part 7 of the Burial and Cremation Act in 2008. These provisions are discussed in *Final Words: Death and Cremation in New Zealand*, above n 84.

121 Births, Deaths, Marriages, and Relationships Registration Act 1995, ss 42(1) and 48(1). See generally Department of Internal Affairs *Before Burial or Cremation* < [www.dia.govt.nz](http://www.dia.govt.nz) > .

122 Births, Deaths, Marriages, and Relationships Registration Act 1995, s 51.

123 Section 78G.

124 Section 78H.

125 Section 74(3). Searches for statistical or research purposes are subject to s 75G.

126 Burial and Cremation Act 1964, s 50. This section extends to denominational burial grounds and the trustees of private burial grounds by virtue of sch 1 to the Act.

127 Law Commission "Survey of Cemetery Trustees" (April 2012).

no central register. Section 50 does not expressly mention disinterment but it could be regarded as implicit that the register should be altered to reflect any disinterment.

### Crematorium registers

3.67 The Cremation Regulations require every cremation authority<sup>128</sup> to appoint a registrar to keep a register of cremations.<sup>129</sup> The crematorium registers established under regulation 9 are not public registers; the intent of the registers is to provide particular information to health officials upon inspection:

#### 9 Records and register

- (1) The cremation authority shall appoint a registrar who shall keep in form H of Schedule 1<sup>130</sup> a register of all cremations taking place at the crematorium. He shall make the entries relating to each cremation immediately the cremation has taken place, except the final entries, which he shall make as soon as the ashes have been delivered to any person or otherwise finally disposed of.
- (2) The Medical Referee shall, after determining an application for cremation, deliver to the registrar all documents held by him in connection with the application (whether or not he permits the cremation) except the copy of the form of permission to cremate sent to an attendant pursuant to subclause (8) of regulation 7.
- (3) All applications, certificates, statutory declarations, and other documents relating to any cremation, whether that cremation is carried out pursuant to these regulations or pursuant to another enactment, shall be marked with a number corresponding to the number in the register, and shall be filed in order and shall be carefully preserved by the cremation authority. All such registers and documents shall be open to inspection at any reasonable hour by any constable, Medical Officer of Health, health protection officer, or any person appointed for that purpose by the Minister.
- (4) When any crematorium is closed the crematorium authority shall send all registers and documents relating to the cremations which have taken place therein to the Minister, or otherwise dispose of them as he may direct.
- (5) In the application of the regulation to cremations taking place elsewhere than in an approved crematorium, the Medical Officer of Health shall carry out the duties thereby imposed on registrars as nearly as may be.

### Access to information

- 3.68 From our preliminary consultation, we heard that local authority cemetery managers receive frequent requests for gravesite and burial information from genealogists. Some also often receive requests for information about reserved burial plots from the funeral services sector, and must grapple with assessing the privacy implications of releasing plot information about people who are still living.
- 3.69 Aside from the official registers described above, public access to information held by cemeteries is governed by legislation including the Official Information Act 1982, the Local Government

128 A “cremation authority” is defined in regulation 2 as “any person or body of persons for the time being having the control and management of a crematorium.”

129 Cremation Regulations 1973, reg 9(1).

130 Form H of sch 1 to the Cremation Regulations requires the following matters to be recorded: consecutive number of application for cremation, full name of deceased, sex, age, date of death, place of death, date of Medical Referee’s permission or other authority, date of cremation, method of disposal of ashes, date of disposal of ashes, signature of person receiving ashes, ground of recipient’s claim (i.e. applicant for cremation; relative of deceased – relationship to be stated).

- Official Information and Meetings Act 1987<sup>131</sup> and the Privacy Act 1993.<sup>132</sup> The Privacy Act applies to both the public and private sector, while the official information legislation applies to the public sector only. However, the Official Information Act extends to any information held by an independent contractor<sup>133</sup> and the Local Government Official Information and Meetings Act extends to information that a local authority is entitled to access under a contractual arrangement.<sup>134</sup>
- 3.70 The right of public access to information held by cemetery managers therefore depends on the type of cemetery or burial ground and the statutory obligations. Direct public requests for access to information can only be made to public crematoria under the official information legislation (unless the contractual extension provision applies) not private crematoria. Requests for information about private crematoria could however be directed to the Ministry of Health.
- 3.71 The provision of information in response to a request under the official information legislation will depend on the applicable withholding grounds (which include the protection of personal privacy, including the privacy of deceased persons)<sup>135</sup> and the balance of the public interest.<sup>136</sup>
- 3.72 In chapter 7 we consider options for reform of the information provisions.

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131 Administering bodies of “reserves” as defined in the Reserves Act 1977 (other than a Minister of the Crown or a department) are included in Schedule 1 to the Local Government Official Information and Meetings Act 1987, and are therefore subject to Parts 1 to 7 of that Act. One of our proposals in chapter 7 is that local authorities be required to review and update the Reserves Act classification of existing unclassified cemeteries.

132 However the Privacy Act 1993 generally only applies to information about a living individual: s 2(1) definition of “individual”.

133 Official Information Act 1982, s 2(5).

134 Local Government Official Information and Meetings Act 1987, s 2(6).

135 Local Government Official Information and Meetings Act 1987, s 7(2)(a). Other withholding grounds include prejudice to commercial position, s 7(2)(b)(ii) and prejudice to measures protecting the health and safety of members of the public, s 7(2)(d).

136 Local Government Official Information and Meetings Act 1987, s 7(1).

# Chapter 4

## Burial in New Zealand today: an overview of the current practice

### INTRODUCTION

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- 4.1 As illustrated in the previous chapter, local authorities in New Zealand have been responsible for providing public cemeteries for well over a century. By the early 20th century, it had become the norm for most burials to take place in council-controlled cemeteries (or for Māori, in urupā). The Burial and Cremation Act 1964 further entrenched the local authority role.
- 4.2 However, while the Act specifically excludes all but religious groups from establishing new burial grounds, a large number of trustee-managed cemeteries, which were established early last century, remain. While many of these are closed for new burials, approximately 100 trustee-managed cemeteries are still serving communities around New Zealand.<sup>137</sup>
- 4.3 The Act attempts to provide a legal framework that can operate across this mix of public and charitable providers, protecting a wide range of public and private interests. It imposes certain legal obligations on both public and religious providers, but also confers on these providers wide powers allowing them to control and manage most aspects of cemetery provision. However, it reserves for the Crown (through the Minister of Health or his/her delegate) significant control and decision-making authority over matters that were perceived to present a risk to public health, or which could see land used for human burial disturbed or diverted for another purpose.
- 4.4 The object of this chapter is to describe how, in practice, the sector is functioning. We also highlight some of the issues our research and preliminary consultation suggest may need to be addressed in any future reforms.
- 4.5 In the following section we provide an overview of the burial options available to New Zealanders and detail some of the planning, management and operational practices arising under the different frameworks that apply to these different providers. We deal with the following:
- local authority managed cemeteries;
  - trustee-managed cemeteries;
  - denominational burial grounds;

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<sup>137</sup> The precise number of trustee-managed cemeteries is unknown. In 1998, the Office of the Auditor General (OAG) reported that it had audited the records of 131 trustees in the past year. The second OAG report on the sector was in 2005/2006, at which point the number of trustees submitting audit records had fallen to 97. Since then a few trustees have transferred management to local authorities, though not all have completely formalised this process. In addition, we have identified from local authority records a small number of trustee-managed cemeteries that are unknown to the OAG. It is possible that there are others which we have not identified. See *Report of The Controller and Auditor-General on Public Consultation and Decision-making in Local Government* (Office of the Auditor-General, Parliamentary Paper B 29[98a], December 1998); and *Controller and Auditor-General Local government: Results of the 2005/06 audits* (Office of the Auditor-General, Parliamentary Paper B29[07b], June 2007).

- burial on private land; and
- urupā.

### Information gathering

- 4.6 Because each local authority provides cemetery services independently of central government, and of each other, national data about the sector is very limited.<sup>138</sup> To help fill this void we asked New Zealand’s 67 territorial authorities to complete a comprehensive survey designed to provide both a snap shot of the public cemetery sector and an initial indication of some of the issues and challenges local authorities were encountering within the current regulatory environment.<sup>139</sup> We refer to this survey as the Local Authority Survey.
- 4.7 The survey sought information on a wide range of issues including the existing and future financial burden on ratepayers for the provision and maintenance of cemeteries, the level of community consultation councils engage in when planning new cemeteries, and the extent to which local authorities are responding to the changing social, cultural and spiritual requirements of their communities for the place and manner of interment. We draw extensively on the information provided to us through this survey during this discussion.
- 4.8 One of the critical issues we address in this review is the adequacy of the current law for managing and protecting historic cemeteries and burial grounds. An important first step in this process has been endeavouring to establish the legal status and management or ownership structure of these historic trustee-managed cemeteries. To this end, in November 2011, we wrote to the trustees of nearly 100 trustee-managed cemeteries around the country asking them to provide basic information about the cemeteries under their control. This request included whether the cemetery remained open for burial, the underlying legal status of the land, and the succession plans (if any) they had for the management and maintenance of the cemeteries if it became impossible to retain the legal minimum number of trustees.<sup>140</sup>
- 4.9 In this chapter we report the findings of this research and highlight the issues raised by providers. As will become evident, these issues range from questions of policy and law through to what might best be described as operational issues relating to the day-to-day management of cemeteries and burial grounds. In the following chapters we analyse these issues in greater depth before putting forward some preliminary proposals for reform in chapter 7.

### LOCAL AUTHORITY PROVIDERS

- 4.10 Of the estimated 30 per cent of New Zealanders who are buried rather than cremated, the majority are interred in cemeteries established and managed by local authorities.
- 4.11 Our survey revealed wide variation in the number and status of cemeteries operated by local authorities around New Zealand.<sup>141</sup> Some communities continue to have access to cemeteries reasonably close to their local neighbourhood, while others are serviced by one or two large public cemeteries developed on the urban fringe. For example, only one of Wellington’s and

138 For example, we do not have a central register of all cemeteries and burial grounds and at present there is no legal requirement for land used for burial to be formally designated. Nor is there any national database recording where an individual was either cremated or buried. However, many local authorities have amassed a wealth of information about cemeteries and burial grounds in New Zealand’s various districts. Thanks to the effort of local authorities, libraries and genealogists, much of this information is now available online. These databases include not only the open council-owned and managed cemeteries but many of the historic cemeteries and denominational burial grounds that have served New Zealand communities for more than 100 years.

139 Law Commission “Survey of Local Authorities” (November–December 2010) [Local Authority Survey]. Completed surveys were received from 43 local authorities.

140 Law Commission “Survey of Cemetery Trustees” (April 2012) [Cemetery Trustees Survey].

141 Local Authority Survey, above n 139.

Tauranga's cemeteries remain open for new burials, the others either being closed or providing only for second interments and ash interments. Although the amalgamated Auckland Council now has 52 cemeteries within its territory, most of these are closed or open only for additional interments, and most of the open cemeteries are a significant distance from the central city. Similarly, Christchurch has 27 cemeteries but only five are open for new burials.

- 4.12 District councils whose boundaries encompass large rural areas are often responsible for dozens of smaller, geographically dispersed public cemeteries, although they may have very few burials each year.<sup>142</sup> For example, Southland has 15 cemeteries, and the region has an additional 12 trustee-managed cemeteries. Many councils have had to assume responsibility for some formerly trustee-managed cemeteries and, less commonly, some burial grounds that are no longer maintained by churches.

### Denominational areas in public cemeteries

- 4.13 As discussed previously, New Zealand's burial law has always been designed to accommodate religious diversity as far as is possible within the secular framework established for the provision of public cemeteries. Section 11(1) of the Act gives local authorities the power to permanently set aside a portion of a public cemetery for the exclusive use of any religious denomination. Currently, local authorities have almost complete discretion as to whether or not to establish denominational areas within their cemeteries.
- 4.14 Analysis of our Local Authority Survey revealed differences in approach to the provision of denominational areas. These are a reflection of the different religious, ethnic and demographic makeup of these communities, and their differing capacities and resource constraints. Local authorities with responsibility for larger urban areas have tended to provide more denominational sections within their public cemeteries, including new areas reflecting our increasingly diverse urban communities. For example, Wellington's Makara Cemetery provides a wide range of different areas for both religious and ethnic communities, including various Christian denominations, Hindu, Muslim, Progressive and Orthodox Jewish, Chinese, and Pacific Island areas. Historic cemeteries are also likely to have a greater number of denominational areas reflecting different divisions within Christianity.
- 4.15 However, in many parts of the country, demand for separate Christian denominational areas has diminished, and we understand that in some cases local authorities have introduced policies stipulating that all new sections of a cemetery will be non-denominational.<sup>143</sup> At the same time, as discussed in chapter 2, New Zealand's increasing ethnic diversity is reflected in the growing number of local authorities establishing separate areas for burial according to Islamic customs and rites.<sup>144</sup>
- 4.16 Our survey also indicates that responses to requests for denominational areas may be influenced by concerns about management efficiency.<sup>145</sup> From a local authority perspective, setting aside different areas complicates cemetery management, increases maintenance costs, and in particular makes it more difficult to project future capacity. This difficulty arises because the capacity of each separate area must be assessed rather than the capacity of the cemetery

142 In 2011, there were 19 regions with fewer than 100 deaths. The lowest rate was in the Chatham Islands with only two deaths. In contrast, there were 3140 deaths in Christchurch and 6243 in metropolitan Auckland (that is, the former Auckland city, Manukau city, North Shore city and Waitakere city combined). See Statistics New Zealand "Local Population Trends" < [www.stats.govt.nz](http://www.stats.govt.nz) > .

143 Many of those completing our Local Authority Survey indicated that while historically separate areas had been set aside within council cemeteries for the burial of different Christian sects this practice had been discontinued.

144 For an example of a Local Authority that is seeking to become more responsive to an increasingly diverse population, see Tauranga City Council, Strategy and Policy Committee "Adoption of Draft Exclusive Burial Areas in Council Cemeteries Policy" (29 June 2010) < [www.tauranga.govt.nz](http://www.tauranga.govt.nz) > .

145 Local Authority Survey, above n 139.

- as a whole. For example, Waikumete has an array of denominational areas, some of which are nearing capacity, and some of which have capacity through to 2050. Many of the denominational areas in this cemetery are as old as the cemetery itself and are still open to new burials. In contrast, the cemetery as a whole has capacity only for a few more years if it is not expanded.
- 4.17 We were also informed that North Shore Memorial Park does not intend to accommodate any requests for new denominational areas, and has already rejected a request from the Islamic community. While this cemetery has significant scope for future development, the request was declined because of the constraints this would impose on planning and land utilisation as a result of the special requirements of Muslim burials, including the size of plots and the orientation towards Mecca. However, within the greater Auckland areas, Muslim burial areas are available within Waikumete and Manukau Memorial Gardens.
- 4.18 A number of local authorities, including Christchurch and Wellington, and Auckland's Waikumete Cemetery also have specially designated urupā within the confines of the public cemetery. These are often developed in conjunction with urban Māori, who do not necessarily have an enduring connection to an ancestral urupā.
- 4.19 In chapter 5 we consider more closely the extent to which the current provisions provide the appropriate balance between responsiveness to different community needs, and efficient cemetery management.

### Burial of members of New Zealand's defence forces

- 4.20 Under section 15(1) of the Act, local authorities are also given the discretion to set aside a portion of any cemetery under their control for the burial, without fee, of persons who have been on operational service in any division of New Zealand's defence force.<sup>146</sup> The section also provides for the burial of service persons' husband, wife, civil union partner or de facto partner.<sup>147</sup> Local authorities give effect to this obligation through setting aside Returned Services sections in public cemeteries. When the Act was passed, significant future need was anticipated for this burial space for the returned servicemen from the two World Wars.
- 4.21 The survey showed that most local authorities have set aside Returned Services sections in at least one of their major cemeteries, but in recent times the rates of interment in these areas has decreased.<sup>148</sup>

### Historically significant graves

- 4.22 The majority of respondents reported that their older cemeteries contained gravesites pre-dating 1900 and so were categorised as "archaeological sites" under the Historic Places Act 1993.<sup>149</sup> However, our survey revealed wide variability in the management of such sites, including the extent to which funds had been set aside for the restoration of old graves, the extent to which such sites were formally notified within the district plan, and whether significant sites had been officially registered with the Historic Places Trust.
- 4.23 At one end of the spectrum some local authorities were strongly engaged in identifying historically significant graves and cemeteries and had a number of heritage orders in place.

<sup>146</sup> Section 15(2) establishes that the Minister of Veterans' Affairs, after consultation with the Minister of Defence and the New Zealand Returned and Services' Association, may specify, by way of a notice in the Gazette, any "war, armed conflict, peacekeeping force, or other operation" which would meet the definition of operational service for the purposes of the Act.

<sup>147</sup> Veterans Affairs wants clarification of the partner's rights; in particular, whether these only apply after the member of the armed forces has died and been interred in the area or, in cases where the spouse dies before the member, whether they may be interred first.

<sup>148</sup> Local Authority Survey, above n 139.

<sup>149</sup> Historic Places Act 1993, s 2; Local Authority Survey, above n 139.

A number had developed comprehensive Conservation Management Plans for their historic cemeteries and were aware of their obligations under the Historic Places Act 1993 and Resource Management Act 1991 with respect to these sites.<sup>150</sup> Some historic cemeteries or parts of cemeteries also have the status of “historic reserve” under the Reserves Act 1977.

- 4.24 Many other respondents were aware their older cemeteries contained historic graves and that the cemeteries themselves were of both local and potentially national cultural and historical significance. Although few sites had been registered with the Historic Places Trust, most were recorded in the relevant district plan and were recognised as sites of significance to the local community. However, some smaller local authorities find it difficult to maintain older cemeteries, which have fallen into considerable disrepair.
- 4.25 According to the New Zealand Historic Places Trust, of the approximately 5,650 historic sites included in the Register, 65 are listed as Māori urupā and 50 as cemeteries. More than 485 churches are also registered, 26 of which specifically include church graveyards or burial grounds. However, it may be assumed many of the historical churches have graveyards attached to them.<sup>151</sup>

## Emerging Issues

### *Capacity and resourcing*

- 4.26 The majority of councils estimated they had sufficient capacity within their existing cemeteries for three decades or longer, provided burial rates remained stable.<sup>152</sup> However, 26 of the local authorities who responded to our survey anticipated having to make significant capital investment over the next decade, either to expand existing cemeteries or to establish new cemeteries. New Plymouth District Council’s current capital programme for the development of a new district cemetery is projected to cost \$2.3 million over the period 2009–2019.<sup>153</sup> Areas experiencing significant population growth, such as Tauranga, are exploring options for new sites to develop over the next two decades. In its draft Cemeteries Master Plan published in December 2012, the Christchurch City Council also signalled its intention to outlay up to \$1.5 million to purchase about 50 hectares of land either on the city outskirts or in the neighbouring Selwyn district to provide for the population’s burial needs after current capacity is exhausted sometime within the next 20–40 years.<sup>154</sup>
- 4.27 Many respondents also reported increased demand for natural burial options and were developing natural burial sites either within existing council cemeteries or on land developed specifically for the purpose.
- 4.28 Councils anticipated funding these major capital works and developments from a range of sources, including user charges, loans, and/or development and reserves contributions.
- 4.29 Anecdotal information provided by cemetery managers suggests that there is often a strong community preference for burial in older established cemeteries and those that retain a distinct geographic connection with the community. However, in the main centres at least, the trend

150 See for example the former Waitakere City Council *Waikumete Cemetery Conservation and Reserve Management Plan* (March 2001) < [www.waitakere.govt.nz](http://www.waitakere.govt.nz) > ; the Wellington City Council *Karori Cemetery Conservation Plan* (2003) < [www.wellington.govt.nz](http://www.wellington.govt.nz) > ; and the Christchurch City Council *Barbados Street Cemetery Conservation Plan* (2009) < [www.christchurch.govt.nz](http://www.christchurch.govt.nz) > .

151 Email from Rebecca O’Brien (Registrar of the New Zealand Historic Places Trust Pouhere Taonga) to Law Commission regarding historic cemeteries (27 August 2013). All numbers are approximate.

152 Local Authority Survey, above n 139.

153 Zac Yates “New cemetery site inspired by stream” (1 December 2012) *Stuff* < [www.stuff.co.nz](http://www.stuff.co.nz) > .

154 Christchurch City Council *Draft Cemeteries Master Plan* (December 2012) < [www.resources.ccc.govt.nz](http://www.resources.ccc.govt.nz) > .

- is towards fewer, larger cemeteries on the outskirts of residential areas where land is less expensive.
- 4.30 Selecting a suitable site for a new cemetery can be a long and fraught process. There is a tension between a desire for burial grounds to be accessible and proximate to major centres, and a reluctance to use valuable land suitable for residential development for cemetery purposes. Local authorities are also under pressure not to overspend, therefore the affordability of the underlying land is highly relevant. In addition, land management issues that arise need to be considered, along with the preferences of the local community. These factors influence decisions about cemetery locations, and ultimately the range of cemetery options and the plot prices charged. Recent experiences in Auckland, New Plymouth and Rotorua demonstrate these difficulties.
- 4.31 The need for a new cemetery in New Plymouth became apparent in the late 1990s, as existing cemeteries began to approach full capacity. By December 2005, a new cemetery site had been selected and the Council resolved to purchase the land. The land was acquired under the Public Works Act in January 2007. However, the neighbouring land is used for a poultry farm, and the land owner was concerned about reverse sensitivity issues<sup>155</sup> posed by the proposed cemetery.<sup>156</sup> These issues were ultimately resolved, and the land was gazetted under the Reserves Act 1977 as a Local Purpose (Cemetery) Reserve in April 2012. The site has now been cleared and a landscaping plan has been approved. The site is due to open in 2015/2016, by which time, existing cemeteries are expected to reach full capacity. The new cemetery is expected to provide capacity for the next 60 years.
- 4.32 Existing cemeteries in Rotorua have capacity through to 2015/16. The Rotorua District Council purchased a site for a new cemetery in early 2007.<sup>157</sup> Nearby residents were displeased with the planned development, and in 2011 the Council decided to sell this site and purchase an alternative site. The second site is not yet developed, and is due to open once existing cemeteries reach full capacity. Based on current projections, this site will provide adequate burial space for the next 150 years.
- 4.33 Waikumete Cemetery in Auckland is the largest in the country. Established in 1886, it has served as the main cemetery for the Auckland region for over 100 years. The cemetery is now reaching full capacity, and it is projected that no new plots will be available for sale from 2018. Before the amalgamation of Auckland councils, the Waitakere City Council compared the costs of expanding into undeveloped scrubland on the site, and purchasing new land. Expansion of the existing cemetery was shown to be a far cheaper option, and would provide capacity until 2060. However, the scrubland is a protected ecosystem under the District Plan. Capacity projections took account of burial demand from people living in the former Auckland City as well as former Waitakere City. In November 2012, the Auckland Council released a discussion document on the future management of Waikumete Cemetery including the option for expansion. The discussion document notes that other cemeteries are available in the Auckland region, but that “there is currently no viable alternative cemetery to serve the people of west Auckland.”<sup>158</sup>

155 Reverse sensitivity is a concept that has developed through cases decided by the Environment Court. It occurs when an established use (in this case the chicken farm) has an adverse effect on neighbouring land, and a change in use of the neighbouring land is likely to result in increased complaints about the existing land use, and may therefore require the existing use to adopt new measures to reduce the adverse effects.

156 See Ryan Evans “Council feels cemetery chickens won’t come home to roost” *Taranaki Daily News* (online ed, 28 May 2010).

157 Matthew Martin “Site chosen for Rotorua’s new cemetery” *Rotorua Daily Post* (31 March 2011).

158 Auckland Council “Waikumete Cemetery Management Plan Review – Discussion Document” (1 November 2012) < [www.aucklandcouncil.govt.nz](http://www.aucklandcouncil.govt.nz) > at 15.

- 4.34 In some of the larger metropolitan areas, including Auckland, Christchurch and Wellington, the issue may not be an overall lack of capacity but rather a lack of capacity in the cemeteries most favoured by their communities. These local authorities note that in order to meet future demand it will inevitably be necessary for people to be buried in cemeteries that are not their first preference and possibly not geographically close to the area with which they were connected during life. The extent to which citizens should be able to exercise choice regarding the location, character, and cost of burial site is a question we discuss further in chapter 5.

#### *Repossession of unused plots*

- 4.35 A number of councils raised concerns about the impact of section 10(4) of the Act on their ability to maximise the capacity of existing cemeteries, particularly those containing large portions of older graves. As discussed earlier, this section was introduced by the 1964 Act, and provided for this right to expire after 60 years if no burial had taken place within this time.
- 4.36 Despite this amendment it appears very few local authorities are enforcing this provision and a significant number raised concerns about the constraint pre-sold, but unused, burial plots were placing on the optimal management of cemeteries, particularly older cemeteries which were nearing full capacity.<sup>159</sup> For example respondents for the New Plymouth District Council reported that at Te Henui, one of its earliest and largest cemeteries, there were 1,200 pre-sold plots that had passed the 60-year point with no burial taking place. The difficulty is that these are interspersed throughout the cemetery.
- 4.37 However, views on the appropriateness of the 60-year expiry clause were by no means unanimous. Some wished to see the term shortened in light of the increasingly transient resident population; others argued it should be extended to 100 years to ensure those wanting to make provision for future generations to be buried together in the same land could do so with greater certainty.<sup>160</sup> A number of respondents questioned the appropriateness of the expiry provision, arguing that once a person had purchased an exclusive right to burial it should not be rescinded under any circumstances. Yet practical difficulties arise with a longer term, as locating the owner of the plot becomes less straightforward as time moves on from the original date of purchase. Some councils had also introduced bylaws or management plans either preventing or restricting the pre-purchase of plots in an effort to extend the life-time of cemeteries nearing capacity.
- 4.38 Once burial has occurred all local authorities contract to provide perpetual interment. This is a matter of discretion rather than law. Under section 10(1) local authorities are able to issue a shorter licence (although if a shorter term were provided for, a licence for disinterment would be needed before remains could be removed). In many jurisdictions the tenure must be renewed at the end of the original contract term or provision may be made for the re-use of the plot. Whether New Zealanders would accept shorter tenures in the interests of extending the capacity of cemeteries and/or lowering the costs of burial is an issue we return to in chapter 7.

#### *Transfer of unused plots*

- 4.39 Cemeteries are public places, but they also involve private interests, including the interests of those who purchase rights to interment and their survivors. These interests are typically

159 The Manawatu District Council appears to be one of the few councils to have exercised its discretion to shorten the contract period for pre-purchased plots in order to increase capacity. At the end of the contract period the right to interment in plots where no burial had taken place reverts to the council and can be re-sold.

160 Respondents for the Whangarei District Council pointed out that local *urupā* did not necessarily have the capacity to accommodate all those who wished to be buried in them. It was therefore important for local Māori families to be able to make adequate provision for present and future generations to be buried together in council cemeteries. Imposing a 60-year or shorter expiry date on contracts could prevent this from happening.

- encapsulated in contracts or deeds conferring a “right of interment” on the owner. Because that right is only exercised posthumously, difficult issues can arise when decisions need to be made about transferring those rights or extending them to others in a family. They may also arise before burial has occurred.
- 4.40 Under the Act local authorities are empowered to sell an “exclusive right of burial” either in a cemetery plot or vault.<sup>161</sup> Those who enter into contracts with local authorities for a burial are effectively sold a perpetual licence to occupy the land. However, this licence does not imply ownership or control of the land itself, and the exact nature of the legal interest including rights to future transfer is often unclear. If the deed of sale does not clarify the nature of the rights, these rights become an ambiguous and variable matter of interpretation, often informed by subsequent bylaws.<sup>162</sup> For historical deeds of purchase, it may be difficult to ascertain the original intention of the parties and their understanding of the transaction.
- 4.41 Local authorities have adopted different approaches to the transfer of the deeds to unused plots. For example, Dunedin reported that as the issue could be highly contentious when there are family disputes, it had adopted a strict policy of not allowing the transfer or reassignment of deeds (although it does allow them to be rescinded to the Council and the original purchase price refunded). In contrast, Wellington City Council has developed a formal application process requiring the applicant to establish their relationship with the original deed holder and the authority under which they seek the transfer.

### *Resourcing*

- 4.42 Cemeteries by their nature offer only short- to medium-term potential for revenue generation.<sup>163</sup> Once a cemetery has reached full capacity it will become a loss-making asset as revenue streams end, but ongoing maintenance costs continue in perpetuity. For this reason, and because of their cultural and social significance, many local authorities manage their cemeteries under the broad umbrella of their parks and recreational facilities.
- 4.43 With a few notable exceptions, our Local Authority Survey also showed that the income generated by cemeteries from user charges was insufficient to meet total cemetery expenditure.<sup>164</sup> In almost all cases the shortfall is met by a rates subsidy. The level of rate-payer subsidisation ranged from 75 per cent in some sparsely populated regions, to between 50 and 30 per cent in metropolitan centres. Auckland pointed out that the split between user pays and ratepayer funding varied depending on the size, age and location of the many cemeteries. Like Hamilton, Auckland’s large memorial parks were fully operation cost recoverable, but this was not achievable with many of the smaller semi-rural cemeteries.
- 4.44 Other variables that affect cemetery revenues include the demographic profile of the area, such as the age and ethnic make-up of the population (which has a bearing on the preference for burials over cremation), the age and capacity of cemetery stock, the availability of crematoria in

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161 Burial and Cremation Act, s 10(1).

162 A form of delegated legislation usually made by local authorities.

163 Section 18 of the Burial and Cremation Act requires that all money received by a local authority from the provision of cemetery services be credited in a “separate account” and “applied in the management and improvement” of the cemeteries under its control. While the majority of respondents reported that separate accounts were maintained for cemetery income, this was not universal. It is arguable that the stringent accounting and financial reporting requirements to which all local authorities are now subject may have made this provision redundant.

164 Local Authority Survey, above n 139.

the region (including whether the council itself operated a crematorium)<sup>165</sup> and the level of fees charged.

- 4.45 According to a recent media survey, the fees charged by local authorities for burial plots and interment have increased, on average, by 30 per cent in the past four years.<sup>166</sup> However, the survey also showed wide variation in charges across New Zealand. Among the highest were Auckland's North Shore Memorial Park and Waikumete, where plot and interment fees range between \$2,975 and \$5,400. In other districts, including Gisborne, Dunedin and Napier it is possible to purchase a plot for less than half these sums. In many respects these variations in cost reflect the underlying land values. As we will discuss in the following section on trustee-managed cemeteries, it is still possible to purchase the right of interment in some rural cemeteries for as little as \$200, while others charge only a nominal fee for local residents. Additional fees are usually levied for anyone from outside the district and for interments outside normal council working hours. In some jurisdictions, cemeteries provide instalment payment options for the pre-purchase of plots. We are not aware of any local authorities that offer this option, though it would be within their powers to do so.
- 4.46 Many local authorities appeared to set fees that covered the direct costs associated with burial, including the preparation of graves. The maintenance of cemeteries is then funded from rates. Approximately half of the survey respondents signalled that the rate-payer contribution to the maintenance of cemeteries in their districts was forecast to increase over the next five years due to the increased costs of maintenance (mostly outsourced to contractors), and to fund improvements.<sup>167</sup>
- 4.47 Striking the appropriate balance between public and private contributions posed an increasing challenge for some local authorities, as noted in the Tauranga survey response:
- The burial plot fees do not reflect the cost of the plot and maintenance in perpetuity, but if we were to increase them to accurately reflect this cost then the plot fee would be very expensive, and we would be prohibiting people from purchasing them...
- 4.48 Other than rates contributions the only other source of funding available to councils came from Veterans Affairs, which provided grants to assist with the provision and maintenance of graves for those who have been on operational service in the New Zealand Defence Forces.<sup>168</sup> A few respondents also reported receiving small grants from the Ministry of Culture and Heritage, for the maintenance of historically significant graves.
- 4.49 However, considerable scope exists for council-owned cemeteries to benefit from community volunteer labour, especially through councils entering into partnerships with community groups to maintain historic cemeteries.

### *The role of Friends of Cemeteries*

- 4.50 In many parts of New Zealand, volunteers play a pivotal role in recording and maintaining historic gravesites and cemeteries. This is particularly so in rural areas that still have access

165 Our Local Authority Survey revealed significant differences in the rates of cremations versus burials in each district. For example, in Tasman it was estimated that 70 per cent of the population are cremated while in Gore the ratio was reversed. In districts with no cremation facilities such as Buller, over 90 per cent of the population were buried. While cremation rates tended to be highest in the metropolitan centres, areas with large Māori and Pasifika populations tended to report lower cremation rates. For example, the Ruapehu District Council estimated 85 per cent of its population opted for burial, reflecting the high proportion of Māori in the local authority area.

166 Rob Stock "The rising price of eternal rest" *The Sunday Star Times* (New Zealand, 6 May 2012) at D16.

167 Local Authority Survey, above n 139.

168 Section 15 of the Burial and Cremation Act provides local authorities with the discretion to set aside an area of a public cemetery for the burial of those who have been on operational service as part of the New Zealand Defence Force. The right of burial is without fee and extends to husbands, wives, civil union and de facto partners of the person in service.

to trustee-managed cemeteries. There are also a number of active community-based voluntary groups, which have formed with the specific goal of protecting and preserving some of our largest and oldest public cemeteries. Among these are the Friends of Mount Street Cemetery and Bolton Street Memorial Park in Wellington, Friends of Linwood Cemetery in Christchurch, Friends of the Lawrence Cemetery in Waitahuna, Friends of Auckland's Waikumete Cemetery and a recently established Friends of Symonds Street Cemetery in central Auckland.

- 4.51 A number of these voluntary groups operate with some assistance from the Historic Cemeteries Conservation Trust and undertake a wide variety of tasks, including the physical restoration of individual gravesites and monuments, the detection of unmarked graves, the construction of paths and gardens and the compilation and digitisation of cemetery records.
- 4.52 In many instances these groups work closely with the local authority responsible for the cemetery's management. However, local authorities are not required to consult with or work collaboratively with such organisations. In the course of preliminary consultation we have been told that the absence of any such requirement means the groups are sometimes limited in the scope of the work they are permitted to undertake.

### *Animal interments*

- 4.53 It is apparent from our Local Authority Survey that requests for the interment of animals, or their cremated remains, are becoming increasingly common. In some cases the request is to inter the remains with the pet's owner. In other cases it may involve a separate interment. One local authority alluded to the fact that animals may sometimes be interred in the coffin with their owner without this being formally declared. We note that there are no restrictions on establishing a private cemetery for pets; anyone could create such a cemetery, provided it complies with the provisions of relevant district and regional plans.
- 4.54 Christchurch City Council noted that an animal cemetery was being planned in a regional park. Others noted that they were already providing for animal cremations in crematoria operated by the local authority.
- 4.55 Most local authorities sought some policy guidance on the acceptability of interring animal remains in public cemeteries. Although this issue has been raised in several survey responses, it is peripheral to the core subject matter of this review. We consider that the legislation should remain silent concerning the burial of animal remains, or ashes. Cemetery managers who wish to allow animal interments may do so, and may of course control the burial of animals through bylaws or policies.<sup>169</sup>

## **TRUSTEE-MANAGED CEMETERIES**

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- 4.56 It appears from Hansard (the record of Parliamentary Debates) that at the time the Burial and Cremation Act was passed it was envisaged that trustee-managed cemeteries would all eventually enter into local authority management.<sup>170</sup> While this has happened for many former trustee-managed cemeteries, including some which have transferred management as recently as the past year, around 100 cemeteries throughout the country are still managed by trustees under Part 3 of the Act.
- 4.57 These were established in the early days of our colonial history, and therefore reflect the migration and population distribution patterns of the early European settlers. These cemeteries

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169 For example, the draft *Christchurch City Draft Cemeteries Bylaw and Handbook* includes a provision which provides that “[n]o animal(s), including birds or fish, either as ashes or as a body, can be interred in a Council cemetery.”

170 (14 August 1964) 339 NZPD 1368.

include some of the oldest and most historically significant in the country. They are particularly common in rural areas, where to this day they continue to serve the local communities, for whom the cemetery may provide one of the strongest links with the pioneering past.

- 4.58 There is no central registry of trustee-managed cemeteries, and the Act does not currently require land used for burials to be formally designated.<sup>171</sup> However, the Office of the Auditor General (OAG), which is responsible for auditing the finances of these cemeteries, has records from trustees who comply with the audit requirements, and many local authorities record the existence of trustee-managed cemeteries within their regions. In our research we have identified some trustee-managed cemeteries from local authority records that are unknown to the OAG, and there may be others that have not been identified.<sup>172</sup>
- 4.59 In assessing the current state of trustee-managed cemeteries, we have drawn on information provided by the OAG as well as our own primary research undertaken in 2011/2012. In this section, we rely particularly on data collected from a comprehensive survey of trustees, and interviews trustees and with local authorities.<sup>173</sup> We have also received extensive information from Land Information New Zealand relating to the legal status of cemeteries, and from the Department of Conservation, relating to cemetery reserves.

### Role of trustee-managed cemeteries

- 4.60 From responses to our survey, it appears that rural trustee-managed cemeteries continue to provide a very important community service.<sup>174</sup> Several responses mentioned that the current trustees had ancestors buried in the cemetery. These trustees invariably saw their role as the custodians of a community asset, and emphasised the importance of involvement in the cemetery management to the local community. For example, Drybread Cemetery stated that “the local history and identity is wrapped up in the cemetery”.
- 4.61 Unsurprisingly, many of those who completed our survey expressed strong reservations about conferring control and management of the cemetery to a local authority. Some were concerned that if the cemetery was passed to local authority control, it would be closed, plot prices would increase, or adjacent land earmarked for future expansion would be sold for other purposes. Many trustees commented that costs are kept low because of community voluntary involvement, which results from a sense of community ownership.
- 4.62 These sentiments were captured by the trustees of Dunkeld Cemetery, who noted that:
- Retaining local trustee control in our Cemetery has worked well in the community since 1896. Working on and maintaining the Cemetery instils pride and ownership in our precious Beaumont place of rest. We have had good feedback from families who have loved ones in our cemetery – they enjoy visiting and appreciate the well-kept gravesites, lawns and surrounds. Our Trust is passionate about local history and members are available to help people with their genealogical enquiries. With those things in mind our community would not wish to have the cemetery transferred in to the local authority's jurisdiction, wishing instead to retain this special resting place in the care and management of people who have a special bond with Beaumont. Along with this there is a significant saving in costs retaining it in non-paid Trustee control.
- 4.63 The trustees of Eastern Bush Cemetery noted that their cemetery was a “sleepy little cemetery in a remote location” and it would be “impracticable” for the local authority to maintain the

171 Newly established denominational burial grounds must register a caveat against the title, but existing cemeteries and historic denominational burial are under no obligation to record the cemetery status.

172 As mentioned at above n 137, this means that the exact number of trustee-managed cemeteries is unknown.

173 Cemetery Trustees Survey, above n 140.

174 Cemetery Trustees Survey, above n 140.

grounds. Forest Hill noted that the cemetery was “like a family cemetery”, reflecting the strong connection in the local community arising from several generations having been buried in the same place.

- 4.64 A small proportion of responses expressed concern that in future it might become more difficult to find replacement trustees, and transfer of control to the local authority might be necessary at some stage.

### Legal status of trustee-managed cemeteries

- 4.65 The precise legal status of trustee-managed cemeteries is complicated. As discussed in chapter 3 above, many trustee-managed cemeteries began as charitable trusts. Some continue to comply with the original trust deed, whereas others have no record of the origins of the trust. The Act stipulates “[t]rustees are public entities as defined in section 4 of the Public Audit Act 2001”.<sup>175</sup> Cemetery Trustees are also public bodies for the purpose of the Local Authorities (Members' Interests) Act 1968.
- 4.66 The Cemeteries Act 1908 contained provisions that allowed for the Governor-General to delegate the power to appoint trustees to a local authority, envisioning a system of devolved management.<sup>176</sup> This delegation power is retained in the current Act. Regrettably, however, there are incomplete records of these delegations. It is clear that since at least 1882, trustee-managed cemeteries have been subject to significant government oversight, and that they are a form of public cemetery managed by community appointees, and not private arrangements.
- 4.67 Some trustee-managed cemeteries have registered with the Charities Commission as charitable trusts. There is no obligation to do so, and it is arguably outside the scope of the Charities Act 2005 for public entities of this sort to register. In chapter 7 we consider how best to respond to this unique blend of incrementally developed practice and arcane law.

### Financial status and auditing

- 4.68 Under the Act, trustees must apply all funds to the maintenance of the cemetery.<sup>177</sup> They must keep accounts of all money received and expended, and the accounts must be audited yearly, consistent with the obligations for public entities under section 4 of the Public Audit Act 2001.
- 4.69 A number of the trustee-managed cemeteries responding to our survey expressed the view that the auditing process was unduly time consuming, given the small amounts involved.<sup>178</sup> The OAG also notes that in many cases, the costs of undertaking the audit exceed the yearly funds received by the cemetery.<sup>179</sup>
- 4.70 Upper Wairau Cemetery paints a fairly typical picture of a fully operational and well-run rural trustee-managed cemetery. This cemetery charges \$500 for a burial plot and \$200 for interment.<sup>180</sup> In 2012, the annual return submitted to the Charities Commission shows a total income of \$6,376, expenditure of \$4,799 and cash assets of \$37,931. The report also showed an average of 10 volunteer hours worked per week and no paid employees. This reflects a

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175 Burial and Cremation Act, s 29.

176 Cemeteries Act 1908, ss 6–9.

177 Burial and Cremation Act, s 28.

178 Cemetery Trustees Survey, above n 140. Records from the OAG in 2007 showed that of the 98 trustee-managed cemeteries audited in 2005/2006, 73 per cent had cash holdings of less than \$10,000, while 92 per cent had annual receipts of less than \$10,000 and 95 per cent had annual payments of less than \$10,000. See Controller and Auditor-General *Local government: Results of the 2005/06 audits* (Office of the Auditor-General, Parliamentary Paper B29[07b], June 2007).

179 At [65].

180 Based on results received from the Cemetery Trustees Survey, the median cost for a plot in trust managed cemeteries is \$250, and the average cost is \$350. However, several cemeteries reported charging only a nominal fee (ie less than \$100).

common practice among trustee-managed cemeteries: the fees are kept low, and maintenance is performed by volunteers.

- 4.71 A significant outlier is Mangere Lawn Cemetery in Auckland. This cemetery was established in 1893 near the centre of Auckland in an area that was historically excluded from town limits. As Auckland expanded, demand for burial space increased, and Mangere Lawn Cemetery now operates a crematorium and functions as a full service cemetery. Fees are \$2,600 for a plot, and \$1,000 for interment. The most recent annual returns show that this trustee-managed cemetery employs seven people full-time and one person part-time, receives over a million dollars in annual income from cremation, plot sales, and investment, and has over two million dollars in cash reserves. From discussions with the cemetery management, we understand that the current trustees intend to continue to amass financial reserves, so a sufficient fund is available for perpetual maintenance of the cemetery grounds after all the plots are sold.

### Emerging issues

- 4.72 While there can be no doubt that trustee cemeteries continue to serve an important function within the sector, our preliminary research indicates a number of pressing problems with both the statutory framework and current management structures.<sup>181</sup> For example, not all of these cemeteries have the legally required complement of three trustees and in some cases the trustees were not fully cognisant of their legal obligations under the Act, including financial reporting requirements. There also appeared to be wide variation in the level of maintenance provided.
- 4.73 Of greater concern is the extent to which records are kept of the cemeteries themselves. As mentioned above, there is no central record of trustee-managed cemeteries, and nor is the status of the land consistently noted on the title. This provides significant barriers to the effective oversight of trustee-managed cemeteries.
- 4.74 However, the most significant problems appear to arise when there is a need to transfer control of a trustee cemetery to the local authority. The processes allowing for this are inadequate and difficult to implement. We look at this issue in more detail in chapter 6 below, and options to reform this process are presented in chapter 7.

### DENOMINATIONAL BURIAL GROUNDS

- 4.75 Unlike the United Kingdom, New Zealand does not have a long history of burial within the confines of a church parish. With a few exceptions, churches are not a significant provider of burial and cremation services in contemporary New Zealand.
- 4.76 However, there are a significant number of small denominational burial grounds that were established on land set aside by, or gifted to, the Catholic, Anglican, Methodist and Presbyterian churches early last century. As for trustee-managed cemeteries, there is no central register of these denominational burial grounds although many local authorities have built up comprehensive databases on the burial grounds in their area.
- 4.77 Many of these burial grounds were intended to serve the needs of rural communities but as the size and demographic make-up of rural communities change, many of the associated parish churches have been amalgamated or transferred to larger population centres. As a consequence it has become relatively common for small provincial churches to find themselves in the difficult position of wishing to sell deconsecrated church property containing old burial grounds.

<sup>181</sup> Cemetery Trustees Survey, above n 140.

- 4.78 This contemporary phenomenon is not something the 1964 Act was designed to provide for. At this stage, we have only a partial understanding of how extensive these problems are. In consultation following the release of this Issues Paper we anticipate receiving submissions on this issue to ascertain the best reform options from the perspective of churches and the wider community.
- 4.79 We note that not all denominational burial grounds are associated with small churches. A significant exception is Purewa Cemetery. This is a large and historic denominational burial ground that now caters to the general public. Purewa Cemetery is located on St John's Road in Auckland and was established as an Anglican burial ground in the 1890s.<sup>182</sup> Although still operated by a trust under the supervision of the Auckland Diocese, the burial ground is open to anyone who wishes to be buried there.<sup>183</sup> Fees are \$5,000 for the burial plot and \$1,030 for interment. There is strong demand for burial at Purewa, and the Diocese anticipates that there will be sufficient reserves to establish a \$10 million perpetual maintenance fund when the cemetery reaches full capacity in 2030 (the fund is currently at \$4 million).
- 4.80 Alongside these historic burial places we are also aware of at least two recent instances where the perceived inadequacy of local authority cemeteries or an inability to be buried on private land was a driver behind applications to establish denominational burial grounds.<sup>184</sup>
- 4.81 Auckland Memorial Park was established in 1999, after a group of Auckland businessmen were granted approval to establish a denominational burial ground on privately owned land north of Silverdale (then part of the Rodney District Council). The application for a denominational burial ground was lodged on behalf of the Friends of the Auckland Buddhist Religion Trust and stated that the burial ground was intended to cater for the unmet needs of the region's Buddhist community. The manager of Auckland Memorial Park informed us that dissatisfaction with both the quality and cultural responsiveness of the local authority cemeteries was the key driver in the decision to develop the park. Before applying for approval, the founders undertook significant market research in a number of Asian countries with a view to establishing a burial ground that would meet the needs of migrants from these countries. However, the burial ground is not used exclusively by a particular ethnic group or religious denomination, and the Buddhist community has no ongoing formal involvement in the management of the cemetery.<sup>185</sup>
- 4.82 More recently, in 2012 the Ministry of Health approved an application from a Taupo couple to establish a Jewish burial ground on a portion of their farm adjoining native bush and reserve land administered by the Department of Conservation. The couple, who are long-standing members of the Auckland Hebrew Congregation, had originally applied for permission to be buried on private land, but this application was declined. They then put forward several arguments in support of the establishment of a Jewish denominational burial ground. These included concerns about desecration of Jewish graves in the Taupo cemetery, the Jewish prohibition on cremation and requirement that a body be buried within one day of death, and the wish to be buried in Taupo near family and home.
- 4.83 Supporting documentation, provided to the Ministry of Health by the Health Protection Officer at the Bay of Plenty District Health Board, noted that the closest local authority cemetery, which was 12 kilometres from the proposed site, did not make provision for denominational burial

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182 Although called a cemetery, Purewa is legally classified as a burial ground.

183 Under s 31(1) of the Burial and Cremation Act 1964 the managers of a denominational burial ground may make provision for the burial of other persons who are not adherents of the religious denomination for whom the land was originally set aside.

184 Ministry of Health records indicate that since 1993 only six new denominational burial grounds have been established in New Zealand.

185 The underlying land is owned by a charitable trust established for that purpose ("Hibiscus Trust"), and the cemetery is operated by Auckland Memorial Park Ltd.

sites. In addition, the closest alternative site with suitable facilities was two-and-a-half hours' drive from the applicants' property. The forwarding letter prepared by the district health board noted:<sup>186</sup>

This application has identified a lack of provision for the burial of denominational people in the Taupo district and other local authority areas within Bay of Plenty and Lakes District Health Board areas. It is anticipated that applications for denominational burial grounds and burial in a special place will increase if sufficient provision is not made.

- 4.84 In the next chapter we consider the wider question of how religious and spiritual diversity should be catered for in the provision of places of for burial.

## BURIAL ON PRIVATE LAND

- 4.85 Burial on private land is heavily restricted by the current framework. Burial on private land is only lawful if there is no public cemetery available within 32 kilometres of the place of death.<sup>187</sup> By contrast, burial on private land in rural areas is allowed in the United Kingdom and some Australian states, provided planning requirements are met. From our survey of local authorities, it appears that there is likely to be demand for this option in New Zealand.<sup>188</sup>

- 4.86 Alongside the practical exception based on distance, the Act recognises some very limited circumstances in which an individual may be buried in a place of particular significance other than an established cemetery, burial ground or urupā. Section 47 provides for burial “in any private burial place” which has been used for burials before the commencement of the Act. The permission of a District Court Judge is required for this. Section 48 of the Act also makes provision for burial in a “special place” provided the Minister certifies in writing that “he is satisfied that there are exceptional circumstances which make the burial of that body in that place particularly appropriate.”

- 4.87 The Act provides no guidance as to the objective of this provision or the circumstances under which burial in a special place may be regarded as appropriate. However, the Ministry of Health's guidelines suggest the provision should be understood within the broader context of the Act's prohibition on private burial grounds – in other words, approvals will be reserved for truly exceptional cases. By itself, a long association with an area or piece of land would not normally be sufficient to justify an exemption under this provision:<sup>189</sup>

The Ministry of Health believes that section 48 of the Act was intended to provide for the burial of public notables whose deeds were of national significance. Therefore, an association with the land and/or activities which are of national significance will demonstrate exceptional circumstances.

- 4.88 It is evident from the applications for “burials in special places” considered by the Ministry of Health under section 48 of the Act in the last two decades that many applicants felt strong historical family connections with the land on which they were seeking to be buried. While some of the applicants clearly met the Ministry's criteria of a “public notable” with strong personal associations with the proposed site, many others sought approval solely based on their long association with the land. In most cases, these applications were declined on the basis

186 Letter from Annaka Davis (Health Protection Officer, Bay of Plenty District Health Board) to Keith Gardner (Population Health Protection Goup, Ministry of Health) regarding the application to establish a denominational burial ground at Whakarua (5 January 2012).

187 Burial and Cremation Act 1964, s 46.

188 Local Authority Survey, above n 139.

189 As well as establishing the merit of their case, applicants must obtain any required resource consents from the territorial authority and satisfy local health protection officers that the site is suitable for human burial. They must also consult with local iwi to ensure there are no unresolved issues with the land, and with any neighbours who may be affected by the site. An appropriate caveat must be included in the land's certificate of title and will also be noted by the local authority for purposes of the Land Information Memorandum.

that they had not been able to meet the “exceptional circumstances” threshold. However, as mentioned above, we are aware of one case in which an application under section 48 was declined and the applicant subsequently received authorisation through the alternative route of establishing a small denominational burial ground.

- 4.89 We also note that the Act contains savings provisions for “private burial grounds” established under the Cemeteries Amendment Act 1912. The purpose of this Amendment Act was to create a management framework for the collection of family burial grounds on private land which pre-dated the statutory restrictions on private burial, or which fell under the exception for deaths that occurred more than a specified distance from the nearest cemetery. However, we are not aware of any private burial grounds that are still in use, and it does not appear from our enquiries of the Ministry of Health and local authorities that there is any ongoing government or local authority oversight of these places of burial.

## URUPĀ

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- 4.90 From the earliest days of our burial law, Māori burial places have been governed under a separate legal framework. Most respondents to our Local Authority Survey were aware of the presence of urupā in their district but there was no consistent approach to documenting their locations and no formal information on the number of burials which took place annually in local urupā.<sup>190</sup> Taranaki District Council noted that most towns in its district had their own local urupā and all information pertaining to burials was held by the local iwi.
- 4.91 While people of Māori descent may, of course, be buried in any public cemetery, the law also allows for the establishment of new urupā on Māori land. It is outside the scope of this project to review the way in which urupā are set aside. The governing law is Te Ture Whenua Maori Act 1993, rather than the Burial and Cremation Act. There is also a provision in the Reserves Act 1977 empowering the Minister of Conservation to allow burials to continue in ancestral urupā located on scenic or historic reserves.<sup>191</sup> We are not in a position to comment on the detail of these provisions, although we consider that they are consistent with the principles of the Treaty of Waitangi, and acknowledge the importance of ancestral connections with the land.
- 4.92 However, it is interesting to note the differences between the permissive approach to urupā, and the highly restrictive approach to burial grounds and cemeteries. In particular, in a number of cases it is evident that those with ties to ancestral Māori land who did not necessarily meet the Ministry’s criteria under section 48 were nevertheless given approval for burial on private land on the grounds that the proposed site was in the process of being designated as an urupā. While there are compelling reasons why the law should not interfere with the rights of tangata whenua to be buried on their own land, we consider that many New Zealanders, particularly in rural areas, have a similar desire for burial in a place of particular significance to their family.

## A PRELIMINARY ASSESSMENT OF THE ISSUES

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- 4.93 Our preliminary consultation and the wealth of information provided to us by local authorities and cemetery trustees suggest that while there are no urgent issues associated with the basic provision of public cemeteries, there are a number of significant problems with the current legal framework. As we will discuss in the following chapters, many of these problems are simply a reflection of the age of the legislation itself and that many of its provisions remain narrowly

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190 Hastings survey respondents note that 26 urupā had been identified in the District Plan in 2003.

191 Reserves Act 1977, s 46(2).

focused on managing perceived public health risks, rather than providing a modern and robust framework for the development and management of land used for human burials.

- 4.94 Thanks to our small population and relatively large landmass, New Zealand does not confront the same cemetery capacity problems as many other jurisdictions. However, land in reasonable proximity to our larger population centres is increasingly scarce and expensive. Most local authorities are also operating under tight fiscal constraints. For some, decisions about cemetery developments will involve trade-offs between offering ratepayers more choice at an increased cost, or offering fewer choices to keep costs low. Our preliminary research suggests that the widening gap between the cost of bodily interment in an urban cemetery and the cost of cremation is a significant factor in declining burial rates.
- 4.95 At the same time, our surveys revealed a range of new challenges associated with the far-reaching social and demographic changes which have taken place in New Zealand since the 1960s. For example, many local authorities reported a growing public interest in the provision of natural or eco-burial sites.<sup>192</sup> Some also noted a demand for a more personalised and direct involvement in the burial process. Many are also being asked to respond to the different burial and cremation requirements of New Zealand's growing Muslim, Sikh and Hindu communities. At times these requirements may be difficult to reconcile with the beliefs and customs of others (including local iwi) and within the constraints of existing cemetery management plans.
- 4.96 Over and above these broad framework issues it is also evident that a number of the problems that concerned legislators in 1964 persist today. These include the maintenance of closed cemeteries. Despite attempts to provide local authorities with the power to proactively address the problems associated with disused and dilapidated cemeteries and burial grounds in their districts, including by allowing them to assume management when necessary, preliminary consultation indicates that the maintenance and preservation (let alone restoration) of closed cemeteries and cemeteries containing historic graves, remains a significant challenge for many local authorities in New Zealand. This is likely to worsen in future.
- 4.97 While trustee-managed cemeteries continue to provide a vital service to some New Zealand communities, there is no doubt that the legal framework for the management of these cemeteries is inadequate and outdated. There is a pressing need to improve the processes for transfer of control to local authorities, where it is seen to be appropriate.
- 4.98 This overview of some of the key issues that have emerged during the course of preliminary consultation illustrates the broad spectrum of policy problems raised by cemetery providers. In some instances these problems can be categorised as administrative or operational matters that could be tackled by a modernised statute and better contractual arrangements. However, others raise fundamental questions about the appropriateness of the current model.
- 4.99 As discussed in our introductory chapter, any regulatory framework dealing with death and the disposal of human remains must accommodate a range of public interests. These include the need to protect public health by regulating the place and manner in which bodies are disposed, the need to accommodate the cultural and spiritual needs of individuals and groups with respect to burial practices, and the wider public interest in protecting and preserving land used for human burial.

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192 Local Authority Survey, above n 139.

4.100 In the next two chapters we discuss these interests and the associated policy problems under two broad headings:

- the responsiveness of the current legal framework to the range of individual and community needs with respect to burial; and
- the adequacy of the legal framework for ensuring the sustainable long-term management and preservation of land used for human burial.

# Chapter 5

## The “right to a decent burial” in a modern, multicultural society

### INTRODUCTION

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- 5.1 The preceding chapter provided a high level overview of New Zealand’s cemetery sector and foreshadowed some of the issues confronting providers. As well as looking at operational issues, the terms of reference for this review require us to assess how well the law is operating, not only for providers but for the public they serve. A key question is whether the current framework meets public expectations around burial choice.
- 5.2 As discussed earlier, the current legal framework evolved as a pragmatic response to the haphazard provision of burial places in colonial New Zealand. Its primary focus was on protecting public health by ensuring all communities had access to a public cemetery and that burial took place in a controlled environment. It also sought to limit the proliferation of small cemeteries. The cultural and spiritual needs of individuals and groups with respect to burial practices and protecting the wider public interest in preserving our cultural heritage were to be managed within this framework.
- 5.3 Although cremation is increasingly popular, the provision of places of burial continues to meet an important public need. For some, the decision as to burial location may reflect a strong relationship with a particular place, or a desire to be interred with other family members. For others, the decision to opt for burial rather than cremation represents a deliberate values-based choice. This may reflect cultural or spiritual imperatives,<sup>193</sup> or strong personal convictions about the environment and sustainability. In some parts of the country, cremation services are either not available or are difficult to access.
- 5.4 Our objective in this chapter is to examine how well the current legal and regulatory framework supports the diverse needs of New Zealanders who choose burial over cremation. Preliminary consultation and research have highlighted a number of potential problems with the current regulatory framework. These include the constraints on burial choice within public cemeteries and the wider constraints resulting from the current prohibition on the establishment of private burial grounds and burial on private land. In the following discussion we explain why these issues may be considered problematic, drawing on examples identified in the context of preliminary consultation.
- 5.5 We begin by considering the extent to which the current legal framework accommodates the various human rights involved, including the right to a decent burial, and the right to religious freedom. We also consider what other drivers there may be for allowing greater diversity in burial choice, including the growing interest in “natural burials” (also known as “eco burials”), and the desire of some to be buried on private land.

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193 See ch 2.

- 5.6 Finally, we consider a number of other issues concerning the responsiveness of local authorities to the wishes of their communities and constituents in the provision and management of cemeteries. Foremost among these is the question of memorialisation and the extent to which those who purchase the right to interment should be entitled to exercise choice in the way in which they commemorate the deceased within a public cemetery.

## BURIAL RIGHTS

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### Burial and human rights

- 5.7 The dignity and autonomy of the individual are fundamental values of legal systems that seek to honour and uphold human rights. At death, the right to a decent burial can be seen as an instance of the right of all persons to be treated with dignity. The living benefit from this right through the peace of mind that arises from knowing one's bodily remains will be treated with respect after death. In practical terms, there are many public policy reasons why dignified disposal of human remains should be universally available. Human remains must be disposed of somehow, and ideally this should occur promptly and before a nuisance is created.<sup>194</sup> In areas of high population density, and particularly in cities, there is a strong public interest in providing places for the burial of the dead – both to ensure that these are available, and to control the location of burial.
- 5.8 Historically, ecclesiastical law in the United Kingdom imposed a duty on churches to provide burial grounds, and individuals had a “right of sepulchre [burial] in the parish”. This right also required buried remains to be left undisturbed. While the “right of sepulchre” predates the modern human rights framework, it was itself underpinned by considerations of human dignity:<sup>195</sup>
- All do not seem to hold the same opinion regarding the cause of the introduction of the custom that bodies should be covered with earth ... nevertheless with good reason it seems foreign to the dignity of man's nature that a human body should be trodden under foot and torn to pieces.
- 5.9 As we discussed in chapter 3, the burial law of the United Kingdom changed markedly in the 1800s. Prompted by concerns that the centuries-old framework was insufficient for mass urbanisation, the Metropolitan Interments Act 1850 imposed a duty on municipalities to make adequate provision for burials. In New Zealand, local authorities have had an obligation to provide cemeteries since the enactment of the Cemeteries Act 1882. Perhaps reflecting an underlying commitment to the right to a decent burial, the Burial and Cremation Act 1964 (the Act) also imposes a legal duty on local authorities and cremation authorities to bury or cremate the body of “any poor person” or the “body of any person from any hospital, prison, or other public institution, on the request of the person in charge of that institution” free of charge.<sup>196</sup> In addition, Work and Income New Zealand provides funeral grants to help cover the costs of burial or cremation for those with insufficient assets.<sup>197</sup>
- 5.10 Finally, our criminal law contains provisions that impose sanctions for anyone who “neglects to perform any duty imposed on him by law or undertaken by him with reference to the burial or

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194 This policy driver is reflected in s 86 of the Health Act 1956, which provides for the Medical Officer of Health to order that a burial occur within a certain time, and imposes obligations on local authorities to carry out this order if no-one else is willing or able to do so. Regulation 35 of the Health (Burial) Regulations 1946 also requires bodies to be disposed of “before a nuisance is created by decomposition”.

195 Hugo Grotius *The Law of War and Peace* (1625) at ch 2 “On the Right of Sepulchre”.

196 Burial and Cremation Act 1964, s 49. The person requesting free burial or cremation must produce an order signed by a Justice of the Peace attesting that the deceased's estate cannot meet the costs of burial or cremation.

197 Work and Income “Funeral Grant” < [www.workandincome.govt.nz](http://www.workandincome.govt.nz) > .

cremation of any dead human body or human remains”; and anyone who “offers any indignity to any dead human body or human remains, whether buried or not.”<sup>198</sup>

- 5.11 This range of measures reflects an enduring recognition of the universal right to have one’s remains decently disposed of, and a corresponding duty on the living to ensure that human remains are treated with dignity.
- 5.12 Alongside this implied right to a decent burial, New Zealand law also explicitly recognises the rights of all citizens to practice their faith. Section 15 of the New Zealand Bill of Rights Act 1990 (BORA) states:
- Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.
- 5.13 The right of individuals who belong to an “ethnic, religious, or linguistic minority in New Zealand” to “enjoy the culture” and “profess and practise” the religion of that minority is also expressly protected under BORA.<sup>199</sup>
- 5.14 It is our view that these provisions encompass the rights of different religious and ethnic groups to carry out the various religious rituals and cultural practices observed at the time of death, an event universally imbued with religious and cultural significance.
- 5.15 In theory, the Act provides a framework within which these fundamental human rights can be accommodated. It does so in two ways. First, as a matter of principle, section 6 requires that every cemetery “shall be open for the interment of all deceased persons, to be buried with such religious or other ceremony, or without any ceremony, as the friends of the deceased think proper.” This principle is reinforced by sections 11 and 12, which give local authorities the power to set aside portions of a public cemetery for the exclusive use of denominational groups.
- 5.16 Furthermore, as outlined in chapter 4, religious groups who feel their needs cannot be accommodated within a public cemetery can apply to the Minister of Health for permission to establish their own burial grounds on private land under section 31.

### *Adequacy of the provisions*

- 5.17 Taken together it would appear that these provisions go some way to ensure New Zealanders are able to carry out their religious and cultural observances for the preparation and burial of their deceased members. However, our preliminary view is that both sets of provisions present practical problems.
- 5.18 First, as the law currently stands, local authorities are under no obligation to provide separate denominational areas, as the provision is almost entirely discretionary.<sup>200</sup> Nor are there any specific guidelines to guide local authorities in determining whether to agree to the establishment of a denominational area. Those authorities that have developed a policy tend to take into account factors such as the present and projected size of the particular denominational group, the impact of any special requirements (such as a restriction on double-depth plots) on the capacity of the cemetery, future maintenance requirements and memorial expectations.
- 5.19 However, in the absence of any national guidelines, our Local Authority Survey shows inconsistency in how councils are responding to requests to set aside denominational areas.<sup>201</sup>

198 Crimes Act 1961, s 150.

199 New Zealand Bill of Rights Act 1990, s 20.

200 Under s 11(2) of the Burial and Cremation Act 1964 a denominational group declined permission to establish a separate burial area within a public cemetery may appeal the decision to a District Court Judge in the relevant jurisdiction.

201 Law Commission “Survey of Local Authorities” (November–December 2010) [Local Authority Survey].

The survey also shows that while many cemetery managers are attempting to accommodate religious and ethnic needs within their existing cemetery management plans, there appears to be less willingness to formally designate different denominational areas for different religious and/or ethnic groups. As discussed in the previous chapter, from a local authority perspective, setting aside different areas complicates cemetery management, increases maintenance costs and, in particular, makes it more difficult to project future capacity.

- 5.20 An example of the tension between community responsiveness and management efficiency for the local authority can be seen in relation to Waikumete Cemetery. Waikumete has an array of denominational areas, some of which are nearing full capacity, and some with capacity through to 2050. Many of the denominational areas in this cemetery are as old as the cemetery itself. For example, the Jewish section was established after the old Jewish cemetery on Symonds Street reached full capacity in 1886.<sup>202</sup> Auckland Council is currently consulting on the future of Waikumete Cemetery, including expansion options as the cemetery is projected to reach full capacity in 2018.
- 5.21 If the cemetery is not expanded, the council faces the management challenge of operating a cemetery that is open for new burials in some areas only. This is primarily a financial issue. The denominational areas will effectively become small cemeteries within the main cemetery and so will be more expensive to operate on a per-burial basis, as economies of scale will no longer apply. This mismatch is partially due to an increasing predominance of people with no religious affiliation, or who prefer to be buried in an area for the public generally rather than a denominational area.

#### *Denominational Burial Grounds*

- 5.22 On the face of it, the ability of religious groups to establish their own private burial grounds should mitigate any failures of the public cemetery sector to provide for religious diversity. However, the Ministry of Health has only approved six new denominational burial grounds since 1995. While this low number could suggest that to date most groups have been able to find acceptable solutions within the public cemetery system, an alternative explanation may be that the cost and complexity of establishing a private burial ground under the current provisions are simply too great for most religious groups to contemplate.

#### **Responsiveness to changing beliefs**

- 5.23 As discussed in chapter 2, the religious affiliation of New Zealanders has changed markedly since the Act was passed. While Pākehā religious affiliation has been in gradual decline for a number of decades, affiliation with Christian churches remains high among Māori and Pasifika communities. Religious affiliation is also high within many more recent migrants groups, and for these communities the observation of customary burial rituals remains a vital part of the cultural fabric of their communities.
- 5.24 In the course of our preliminary consultation and research, we heard from a number of ethnic groups looking for ways in which the current legal framework can accommodate their particular burial rites and customs. For example, we met with representatives of Wellington and Auckland's Hindu community who are seeking ways to better fulfil their specific cremation rituals, including physically placing the coffin into the cremator, and releasing the ashes into fresh flowing water.

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202 Members of the Jewish community in Auckland have informed us that there is a strong desire to retain a Jewish burial section that would allow for community control over burial rites and maintenance of graves.

- 5.25 We also received a submission from the New Zealand Buddhist Council highlighting some of the issues of concern to adherents of their faith regarding the laws and practices regulating cremation in this country. The Council wished to see simpler and more transparent processes introduced to allow traditional cremation on an outdoor pyre to occur in specially designated private places.
- 5.26 We are also aware that in some parts of New Zealand representatives of the Muslim community have entered into arrangements with cemetery managers to ensure that local adherents of Islam can be properly buried within a public cemetery. The specific requirements include placing the shrouded body in a sealed wooden chamber in the earth with the body lying to face Mecca. While the body is not in a coffin, the wooden chamber created in the burial pit ensures that no soil comes into contact with the shrouded body. It is important under Islam that the mourners actively assist in all aspects of the burial. In addition, burial must occur as soon as possible after death, generally within 24 hours. As noted earlier, not all cemeteries are necessarily able to accommodate these requirements, and many have an additional charge for burial on weekends or outside the council's normal operating hours.

## BURIAL OUTSIDE OF LOCAL AUTHORITY CEMETERIES

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### Values-based burial choices

- 5.27 One of the specific questions we have been asked to address is whether religious belief should be the *only* ground under which groups should be permitted to establish a private burial ground. Underpinning this question is recognition that other groups may also wish to establish their own burial places. As discussed earlier, BORA protects the rights of ethnic minorities to practise their culture.<sup>203</sup> Section 15 of BORA also explicitly includes the “right to manifest” a belief in “observance” or “practice”. This is broader than merely a right to hold beliefs. Instead, it encompasses the right to act upon beliefs, whether or not based in religion. It is arguable, therefore, that those who hold strong values-based convictions about what should happen to their bodies after death should also be entitled to express these in their mode and place of burial.
- 5.28 There is some evidence to suggest that the Ministry of Health is willing to adopt an expansive view of religious communities in assessing applications to establish denominational burial grounds. For example, in 1996 the Ministry of Health was asked to approve an application from a Marlborough-based trust to establish a denominational burial ground within its 50-hectare land holding in Wainui Bay. The applicants, the “Tui Educational and Spiritual Trust”, were concerned with promoting community and environmental sustainability. The Trust's objectives included the promotion of “spiritual well-being within New Zealand through the unification of religious, cultural and other differences, in order to bring about renewal of love, creative energy and universal wisdom”.<sup>204</sup>
- 5.29 The Ministry of Health's legal advisors considered whether such a trust could fall within the Act's definition of a religious denomination.<sup>205</sup> They noted that while the Act did not precisely define the word “religion”, the fact that it explicitly stated that it could include “any church, sect or other subdivision of such adherents” suggested “an intention to include groups involved with both orthodox and unorthodox spiritual activities”.<sup>206</sup>

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203 New Zealand Bill of Rights Act 1990, s 20.

204 Ministry of Health Denominational Burial Grounds (Internal memo, PH05-06, May 1996), Appendix: The Objectives of the Tui Educational and Spiritual Trust.

205 Section 2 of the Burial and Cremation Act 1964 defines a “religious denomination” as “the adherents of any religion and includes any church, sect, or other subdivision of such adherents.”

206 Ministry of Health Denominational Burial Grounds (Internal memo, PH05-06, May 1996) at [3].

- 5.30 The advisor pointed out that the Deed of Trust could be read as a “creedal statement” and was evidence of an organised and coherent community with articulated spiritual concerns. They concluded that the lack of any common belief in a god or deity was not “fatal to its status as a religion”. The application was approved.
- 5.31 The fact that the Ministry was willing to approve this application suggests it may be willing to recognise what might be described as values-based or “ethical communities” as proxies for religious denominations. However, it is unclear where the boundaries lie. The Ministry addresses each application on a case-by-case basis. It seems possible that permission might be granted to a group committed to the environmental principles underpinning eco-burials, or possibly an ethnic community which lacks religious underpinnings. However, as a matter of principle, we consider that it is undesirable for these important policy decisions to be made by Ministerial officials. This review provides an opportunity to assess whether there is a genuine demand for private burial grounds by non-religious communities, and if so, what legal framework should best regulate the establishment of such burial grounds.

#### *Case study: Natural Burials*

- 5.32 Among the trends noted in our Local Authority Survey is a growing public interest in natural or eco-burials. No national standards currently govern natural burials, but typically they involve the burial of an un-embalmed body in a biodegradable casket or shroud in a relatively shallow plot to promote rapid aerobic decomposition of the body. In most cases the burial sites are marked by plantings rather than headstones or other non-biodegradable memorials.
- 5.33 A national survey on burial and cremations preferences carried out by UMR Research found that approximately a third of New Zealanders would opt for a natural burial if it were available to them.<sup>207</sup> Similarly, a poll on Stuff.co.nz showed that if given the choice 21.9 per cent would opt for a natural burial compared with 16.6 per cent who would prefer traditional burial. Participants were told a natural burial involved burying the body “in a shroud or biodegradable coffin in the ground” and that “a native tree is planted over the remains, in a regenerating bush location”.<sup>208</sup>
- 5.34 Those opting for natural or eco burials are often motivated by a concern for the environment and a desire to have a closer personal involvement in the processes around death and burial. These twin drivers are evident in the mission statement of Natural Burials New Zealand Ltd, a company established in 1999 with the goal of establishing and operating natural cemeteries throughout New Zealand.<sup>209</sup>
- Our fundamental premise is that in death people can make the ultimate gesture to the environment – by ensuring their death funds and nourishes the restoration of land to a more natural state.
- The principle is part of a wider movement that aims to bring about a psychologically healthier social attitude to death.
- 5.35 Initially the organisation sought to establish a natural burial site on privately owned land, but because of the current prohibition on private burial grounds (other than by religious groups) it instead entered into partnership with Wellington City Council to establish a natural burial area within the council-owned Makara cemetery. Since its establishment in 2007, there have been 85 burials in the area.<sup>210</sup>

207 The 2002 survey involved a representative sample of 752 New Zealanders aged 18.

208 The poll had 11,448 votes as at 21 December 2012. The remainder of participants chose cremation or were undecided. See Michelle Cooke “Natural burials the way to go” (20 April 2012) Stuff < [www.stuff.co.nz](http://www.stuff.co.nz) > .

209 Natural Burials “Organisation Description” (November 2003) < [www.naturalburials.co.nz](http://www.naturalburials.co.nz) > .

210 See < [www.naturalburials.co.nz](http://www.naturalburials.co.nz) > .

- 5.36 In the United Kingdom the natural burial movement gained momentum in the 1990s and over the past two decades there have been over 200 “woodland burial” sites established. In her comparative study of burial practices Sally Raudon suggests that lack of a statutory regime providing for cemeteries in Britain and the absence of restrictions on private burial may explain the rapid expansion of natural burial sites.<sup>211</sup>
- 5.37 Our survey revealed that a significant number of local authorities, including Wellington, Hamilton, Blenheim, Whanganui, New Plymouth, Tasman, Kapiti, Christchurch and Marlborough have either established, or are planning to establish, natural burial sites in response to growing interest from their constituents.<sup>212</sup>
- 5.38 However, Natural Burials founder Mark Blackham, who has provided advice to some local authorities, argues that there are compelling reasons for allowing other providers to develop sites on land expressly suited for the purpose of natural burial. The philosophy of natural burials is inextricably bound up with conservation values and it is not always feasible for local authorities to accommodate these values within the constraints imposed by existing cemetery locations:<sup>213</sup>
- In some instances the natural burial area has been ‘tacked on’ to the conventional burial area. This offers limited potential for reforestation and the aesthetic and ecological values associated with natural burials.
- 5.39 Mark Blackham suggests that existing burial laws were enacted at a time when the cultural mindset was restrictive and when the body was regarded as a source of potential contamination:<sup>214</sup>
- We have learned so much more about death from a mental, cultural, physical and health perspective (ie closer to death is better for grieving, for bonding, and dead people do not present a health risk). Those who framed the old laws did not know or think these things.
- 5.40 Natural Burials receives regular inquiries from individuals and groups with land in rural or semi-rural areas who are committed to the regeneration of native forests and who wish to establish natural burial sites within them but are unable to do so because of the current prohibition on private burial grounds.

### Individual burials on private land

- 5.41 Not everyone who wishes to be buried on private land is motivated by religious or ethical convictions. Some simply have a strong desire to be buried in a particular place. However, in New Zealand, unless the deceased has connections with an urupā on Māori land, that option is not currently available other than in exceptional circumstances.
- 5.42 As discussed in chapter 3, at present there are very few situations in which it is lawful for an individual to be buried anywhere other than in a public cemetery or burial ground. The first provision is designed to address public health concerns and allows burial to occur somewhere other than a cemetery or burial ground if a death occurs in a remote location.<sup>215</sup> The second is

211 Sally Raudon “Contemporary funerals and mourning practices: An investigation of five secular countries” (paper reporting on research undertaken with the support of a 2010 Churchill Fellowship, New Zealand, December 2011).

212 According to Natural Burials, “approved” natural burial sites have been established in Wellington, Kapiti and New Plymouth to date. It notes that sites have also been established within local authority cemeteries in other districts but that these do not necessarily fulfil all the criteria as natural burial sites. The website notes that eight more sites are under active consideration. See Natural Burials “Natural Cemeteries in New Zealand” (September 2012) < [www.naturalburials.co.nz](http://www.naturalburials.co.nz) > .

213 See < [www.naturalburials.co.nz](http://www.naturalburials.co.nz) > .

214 Email from Mark Blackham (Founder and Director of Natural Burials) to Law Commission regarding natural burials (19 September 2012).

215 Burial and Cremation Act 1964, s 46.

- a limited provision which allows for burial in a place used for burial before the Act came into force.<sup>216</sup>
- 5.43 The third, and arguably most significant provision, allows for “burial in a special place,” other than a cemetery or urupā, but is dependent upon the Minister being “satisfied that there are exceptional circumstances which make the burial of that body in that place particularly appropriate.”<sup>217</sup> However, this is a particularly high standard and authorisation is rarely granted.
- 5.44 As discussed above, determined applicants have sometimes found alternative routes to allow burial on private land. In at least one case it would also appear that an applicant who was initially refused permission to be buried on their farmland under section 48 was subsequently granted permission to establish a denominational burial ground on the same site.<sup>218</sup> We are also aware of one situation in which a sympathetic local authority agreed to establish a cemetery on donated land, which was then set aside for the exclusive use of the family who donated the land.
- 5.45 In addition to those who have made formal applications to the Ministry for permission to be buried on private land, a number of local authorities serving rural and semi-rural populations noted that some constituents opposed the current restrictions on burial on private land. In some instances, they noted that they were aware unlawful burials had taken place on privately owned rural land.
- 5.46 The local authority most concerned by the current prohibition on burial on private land is the Chatham Island Council. There are no cremation facilities on the Chatham Islands but the Islanders have access to two council-owned cemeteries, two urupā and two denominational burial grounds. However, the Council’s general manager reported that it was common practice for Islanders to be buried in family plots on their own land. Sixty-five per cent of the Islands’ population is of either Moriori or Māori descent and although the land used for burials has not typically been legally designated as an urupā, it is land that has a strong ancestral connection with the deceased. Graves are usually prepared by family members with assistance from iwi. Although the Council encourages landowners to demarcate the land used for burial on the Certificate of Title and to register a covenant to ensure future protection, this is not often done. The Chatham Island Council believes this customary practice should be a legitimate option for communities with enduring connections with the land. Due to the very small population, this is unlikely to cause significant land use pressures; in 2011, there were only two deaths on the Islands.

## MEETING PUBLIC EXPECTATIONS IN THE MANAGEMENT OF PLACES FOR BURIAL

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- 5.47 The preceding discussion addressed fundamental questions about whether the current legal framework is sufficiently responsive to the different values and beliefs of those who wish to be buried. Alongside questions about where burial is permitted in New Zealand, our Local Authority Survey and preliminary consultation have highlighted a number of other issues concerning how local authorities respond to the expectations of their constituents as to what should be permitted in public cemeteries.

### Interment of stillborn babies

- 5.48 The premature end of a pregnancy or the death of a baby before birth or soon after is a traumatic event requiring particular sensitivity from those responsible for providing burial and cremation

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216 Section 47.

217 Section 48.

218 See ch 4 at [4.82].

services. At law, a stillborn child means a dead foetus that was born after the 20th week of pregnancy, or born weighing more than 400 grams.<sup>219</sup> The births of stillborn babies must be registered, and the probable cause of death must be established.<sup>220</sup> Dead foetuses that are born outside of the parameters of this definition are not registered as births under the Births, Deaths, Marriages, and Relationships Registration Act 1995, and there are no legal restrictions regarding the burial of the remains.

- 5.49 Many local authorities have set aside areas for the burial of stillborn babies, often at minimal cost. However, while the law is clear about the point at which a foetus is regarded as a “stillborn”, such definitions can be seen as arbitrary and insensitive to the needs of those who experience loss at an earlier stage in a pregnancy. For some, the burial or cremation of the pre-term foetus is an important part of the grieving process.
- 5.50 Our Local Authority Survey found that the lack of clear guidelines relating to the burial of stillborn babies or pre-term foetuses was a concern for some councils. For example, some cemetery managers were concerned that burials of very premature babies or pre-term foetuses sometimes took place without any authorisation and in unmarked graves. Some had been notified of unlawful burials of stillborn babies on private land.
- 5.51 While some questioned whether this required any legal response, others were concerned about the potential for cultural offence arising from such unregulated burials and saw a need for clearer and more consistent guidelines. In our view, new legislation should provide that cemetery managers must allow the burial of pre-term foetuses in the same area of the cemetery as stillborn babies, on the request of the parents or family. However, given the distinction in law between a stillborn baby and a pre-term foetus, we suggest that it should continue to be permitted to bury a pre-term foetus on land that is not generally approved for human burial, provided of course that land owner consent is obtained.

### Direct burials

- 5.52 Among the most commonly cited trends noted by local authorities was a desire for more direct involvement by families and communities in the interment of their loved ones. This included requests to hand dig and/or fill in the graves and to lower the body into the grave. In some circumstances these requests were driven by religious imperatives. In other cases, it might reflect a commitment to natural burial practices.
- 5.53 A number of councils also noted an increasing trend for families to dispense with the services of a funeral director, purchasing a plot directly from the council and dealing directly with cemetery staff. This might be driven by financial constraints or simply a family’s preference to manage the burial themselves.
- 5.54 The extent to which local authorities were able to accommodate these requests for greater flexibility in the approach to interment varied considerably. We are aware of only one local authority (Gisborne) that allowed families to prepare the grave themselves, but many permitted mourners to either carry out, or assist in, the back-filling of the grave. Most cited safety concerns and the requirements of the Health and Safety in Employment Act 1992 as the reason for declining requests to prepare and fill graves.<sup>221</sup> Some reported that their staff were not comfortable assisting with the interment of bodies without a coffin.

219 Births, Deaths, Marriages, and Relationships Registration Act 1995, s 2.

220 Burial and Cremation Act 1964, s 46A.

221 There are indeed serious health and safety concerns involved. For example, if the sides of the graves are not dug out at the correct angle they may collapse while the grave is still being dug or before the coffin is fully lowered.

5.55 While there are no legal impediments to families conducting their own funeral arrangements, some local authorities were concerned that bypassing funeral directors meant the risks and administrative burden were being transferred to council staff. In particular, some expressed concern about whether staff would be required to check that deaths had been appropriately registered, the medical certificate of cause of death obtained and the identity of the deceased confirmed. By convention, these compliance issues are typically undertaken by funeral directors.

### Choice in memorialisation

5.56 As we discussed in chapter 2, the different religious and cultural customs and practices associated with death frequently extend beyond the point of committal. Ceremonies and offerings in honour of the deceased may be made at the grave in the period immediately following burial and on anniversaries and special days set aside for the commemoration of the dead. The unveiling of a memorial is also frequently a significant occasion.

5.57 The extent to which local authorities permit diversity in memorialisation varies significantly both within regions and between regions. For example, so-called lawn cemeteries conform to a specific layout that typically allows for little ornamentation or individualisation. In other cemeteries, such as Mangere Memorial Gardens, different memorial styles have been permitted to evolve in different sections of the cemetery.

5.58 As discussed above, a right to a plot does not confer ownership and control of the underlying land. Instead, section 9 of the Act provides local authorities with extensive discretionary powers to dictate the type of memorialisation they will accept within public cemeteries, and most have developed prescriptive rules covering matters such as size, height, materials and placement.<sup>222</sup>

5.59 The use of gang insignia on headstones has prompted some councils to implement policies to clarify what is regarded as acceptable inscriptions in a public cemetery. For example, the Porirua Cemeteries Management Plan adopted in 2012 includes a provision stating “no individual monument shall cause offence or unfairly overwhelm adjacent areas either by design, wording or other mark.”

5.60 The Act is silent on the decoration of graves. In the absence of any statutory provisions many local authorities have established bylaws that restrict the allowable decorations, and some will include limits on decorations within contracts for the sale of a plot. Some go so far as to prohibit all decorations except flowers placed directly into a receptacle affixed to the monument. The response to noncomplying decorations varies from turning a blind eye to periodic removal.<sup>223</sup>

5.61 Recently this issue has come to the fore because of the clearance of decorations from the graves of stillborn babies at the “stillborn sanctuary” in Waikumete Cemetery. For many years, families had operated under the assumption that they had the right to decorate the entire plot area. It was common for families to erect low fences around a plot so that toys and other mementos could be placed on the grave. As a result, the stillborn sanctuary had a much more colourful and personal appearance than the rest of the cemetery, with unique decorations on most of the graves. In February 2013, contractors for the Auckland Council bulldozed the decorated areas in front of several rows of graves in the sanctuary. Around two thirds of the graves were affected.

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<sup>222</sup> However, under s 13 of the Act, the acts of a local authority cannot interfere with the inscriptions on monuments in denominational areas.

<sup>223</sup> The Wellington Consolidated Bylaws 2008 (bylaws 27.2 and 27.3) stipulate that

The Council may from time to time set the specifications for memorial hardware and structures that can be installed on plots. Any memorial items, hardware or structures that do not comply with the Council's specifications or that have fallen into a state of decay or become broken or pose a hazard may, at any time, be removed from the cemetery by the Council.

- 5.62 Before the demolition, cemetery management had placed signs in the area noting that decorations would be removed and the area tidied. Unsurprisingly, the families affected do not consider that the signs provided sufficient warning, and vigorously challenged the rationale for clearance. The Council has acknowledged that the communication process could have been greatly improved. They have formally apologised and held public meetings. At the time of writing, decorations were in the process of being retrieved from a rubbish skip, so the affected families could reclaim them. However, comments made on a Facebook support page, “Victims of Waikumete desecration by council”, suggest that the Council has a long way to go to repair the emotional damage and restore the sense of sacredness of the area. A particularly prominent concern of the families involved is that the intention to clear decorations was in itself insensitive and unnecessary, regardless of the process used.

## SUMMARY AND PRELIMINARY CONCLUSIONS

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- 5.63 As this chapter illustrates, the right to a decent burial has different meanings for different people and the extent to which the law currently accommodates these differences raises a range of policy questions. These questions invite us to consider not just where it should be permissible to bury human remains but how interment takes place and how the deceased is memorialised. Some of these questions involve matters of fundamental principle which may require a legislative response. Others might be considered operational and might be most appropriately addressed through the adoption of nationally consistent guidelines or the development of model contracts.

### Human rights

- 5.64 Based on our research and initial consultation we have reached the preliminary view that the legal framework within which burial is provided for in New Zealand has become unnecessarily inflexible in how it meets the full range of policy objectives that arise. Most significantly, it can be argued that the Act does not currently provide scope for individuals and groups to meet their own burial needs, whether based on cultural or ethical imperatives. The general prohibition on burial on private land combined with the effective monopoly local authorities have on the provision of cemeteries mean New Zealanders who wish to be buried rather than cremated have limited choice as to where or how they will be buried.
- 5.65 While we accept there are legitimate practical, fiscal and health and safety rationales for placing limits around how religious, cultural and ethical beliefs are expressed in a public cemetery, our preliminary view is that it is not appropriate for local authorities to have complete discretion to determine where those boundaries lie. For those with deep religious convictions about death and the afterlife, it is imperative that the proper burial rites are observed. It is not acceptable for cemetery managers to dismiss these requests on the basis that they are merely preferences, which are difficult to accommodate.
- 5.66 There is no culturally neutral style of burial, and what is normal for one community may be anathema to another. Local authorities provide an essential public service in operating cemeteries. In an increasingly multicultural society, it is important that this service does not implicitly discriminate against some sectors of the community through a “one size fits all” approach that limits the ability of some groups to give effect to their particular burial requirements. For example, a cemetery that is not open for burials on Sundays disadvantages Jewish and Muslim residents, who generally require burials to occur the day after death and for whom Sunday is not a day of rest. Similarly, a prohibition on decorating graves is likely to disproportionately affect the Pasifika community, as in many Pacific Island cultures decorating

- the grave is an important mark of respect towards the deceased and an integral part of mourning practices.
- 5.67 As we discussed, it is currently possible for religious groups who do not feel their needs are being met within a public cemetery to establish their own burial grounds on private land. However, this is not a simple or cheap process and in our view does not adequately mitigate the problem of lack of choice within the public cemetery sector. Efficient use of land is an important policy goal, especially in urban centres. As our burial law has recognised since 1874, some level of public provision is therefore desirable to avoid a proliferation of cemeteries. This is not to suggest that every public cemetery around the country should be required to meet the burial requirements of every different ethnic or religious group in their community, but rather that local authorities should be required to consider these needs in their overall planning and development of places for burial within their geographic area. We also note that any additional costs associated with the establishment and maintenance of such areas may be recovered through differential plot fees.
- 5.68 As we have seen, religious conviction is not the only driver for change in our approach to burial choice. Local authorities are reporting increasing public interest in natural or eco-burials. In other jurisdictions, including the United Kingdom and some Australian states, registered charitable trusts and other entities are able to establish such alternative burial sites because there is no general prohibition on burial on private land. However, in New Zealand the public is largely dependent on local authorities to develop such alternatives.
- 5.69 Similarly, individuals who wish to be buried on land to which they have a strong personal connection are unlikely to be able to do so lawfully under the current regulatory framework unless they have a whakapapa connection to a particular urupā, or are able to meet the restrictive criteria for “burial in a special place”.<sup>224</sup>
- 5.70 In our preliminary view, there is a case to examine for opening up the sector to other providers and adopting a more flexible approach to allowing burial on private land (such as family farms). This would represent a return to the past when there was a mix of public, charitable and religious providers. Determining whether this would be in the public interest requires a careful assessment of the risks and benefits.
- 5.71 In chapter 7 we put forward our preliminary proposals for reform and explain how the risks associated with liberalising the sector might be mitigated.

### Rights of plot holders

- 5.72 In the past considerable debate has taken place about what role, if any, primary legislation should play in determining the parameters within which individuals and groups may exercise choices about memorialisation.<sup>225</sup> Some may regard these matters as purely “operational” and best dealt with in cemetery bylaws<sup>226</sup> and management plans. However, it is arguable this approach may not give sufficient weight to the rights of minority and religious groups and to the individual burial right-holders.
- 5.73 We think there is a case for ensuring adequate consultation with the public before local authorities impose restrictions on the type of monument that can be erected in a public cemetery. While there must clearly be minimum standards required to ensure a memorial does

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224 Under s 48 of the Burial and Cremation Act 1964.

225 See, for example, the record of the Parliamentary debates concerning cemetery styles which took place during the Committee stage of the Burial and Cremation Act (22 October 1964) 340 NZPD 2908–2922.

226 A form of delegated legislation usually made by local authorities.

not pose a risk, cause offence or infringe on the rights of other plot holders, it is not clear why administrative simplicity or maintenance concerns should be the only criteria determining these matters.

- 5.74 In our view, there is also a significant administrative law issue if bylaws retrospectively restrict rights granted through the contract of plot sale. We are also concerned that stringent general rules restricting decorations are unlikely to match public expectations. Using bylaws to impose these restrictions may be straightforward for the local authority, but there is a real risk that the people affected will not appreciate the significance of cemetery bylaws for issues such as these, and so will not take the opportunity to submit. The rules need to be understood, but they should also be consistent with reasonable expectations. When rules are unnecessarily restrictive, heavy-handed enforcement may well be considered an egregiously insensitive response. Therefore, we consider there may be merit in providing greater clarity about the respective rights and duties of plot holders and cemetery managers. We explore this further in chapter 7.

# Chapter 6

## Management and protection of places of burial

### INTRODUCTION

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- 6.1 In chapter 5 we focused on the rights of individuals and groups with respect to the place and mode of burial. In this chapter our focus turns to the wider public and private interests in the control and preservation of land used for human burial. These interests span the day-to-day management of operational cemeteries and the intergenerational interests in protecting and preserving the heritage values associated with places of human burial.
- 6.2 We anticipate that as a matter of principle most New Zealanders would consider human remains to be sacrosanct, or tapu, and would hold the corresponding view that for cultural, spiritual and sentimental reasons places of burial should be protected. As long as this attitude remains, we consider that the law should reflect the societal importance of long-term protection of burial grounds and cemetery land.
- 6.3 Cemeteries are also a unique form of public amenity, and are not only a resting place for human remains, but also repositories of our history. The Local Government Act 2002 includes cemeteries under the rubric of “sanitary services”,<sup>227</sup> but they also have elements in common with parks, public monuments, and amenities such as libraries, art galleries and museums. Their role in providing open space is particularly important. For example, the Draft Management Plan for Waikumete Cemetery notes that:<sup>228</sup>
- The cemetery is the largest area of public open space within the urban area of west Auckland and one of the largest areas for passive recreation in the urban area of Auckland. The cemetery is increasingly popular for passive recreation activities such as dog walking, and hosts approximately 10,000 visitors a year. ‘Friends of Waikumete’ undertake guided walks, historical research and restoration projects.
- 6.4 However, it is also widely recognised that there may be occasions when other land uses compete with the perpetual protection of cemeteries. In some circumstances Parliament has decided the dead must give way to the living. In both Auckland and Wellington, a historic cemetery has been bisected by a motorway. More recently, an extension of Auckland Airport necessitated the removal of remains from a Methodist church burial ground.
- 6.5 While it is rare for cemeteries and graves to be disturbed in this manner, it is quite common for individual memorials, and in some cases whole cemeteries and burial grounds, to become neglected over time. In some of our older cemeteries, many headstones are in varying states of disrepair and the graves are no longer tended. Visiting a grave may bring comfort to mourners and a memorial may be seen as an important tribute to the dead, but the impetus to maintain individual graves may fade over time as relatives of the deceased die or move away from the area.

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227 Through a roundabout route, s 124 of the Local Government Act 2002 provides that “sanitary services” has the same meaning as “sanitary works” in the Health Act 1956. Cemeteries and crematoria are included in this definition under s 25(1)(h) and s 25(1)(i) of the Health Act.

228 Auckland Council “Waikumete Cemetery Management Plan Review - Discussion Document” (1 November 2012) < [www.aucklandcouncil.govt.nz](http://www.aucklandcouncil.govt.nz) > .

- 6.6 Our objective in this chapter is to provide a context for public consultation by explaining the issues that emerge under the existing law and practice. Together these determine the rights and duties of those who own and manage land used for human burial, and the rights and duties of the individuals who enter into contracts for burial or ash interment with these entities.
- 6.7 At its most fundamental level these laws must provide a robust framework for identifying and protecting land used for human burial. Beyond that they must strike the appropriate balance between sustainable management and the protection of heritage values, and competing priorities for the use of limited council funds. They must also provide cemetery users with clarity about their rights and obligations.
- 6.8 In this chapter we examine issues relating to the management and preservation of land used for burial, focusing on the following problems that have emerged in the course of our research and preliminary consultation:
- the rights and obligations to maintain burial places and memorials;
  - the lack of clarity around the legal status of much land used for human burial in New Zealand and the adequacy of provisions designed to control the sale or re-purposing of land that has been used for human burial; and
  - the adequacy of transitional arrangements allowing for the transfer of trustee-managed cemeteries to the ownership and management of local authorities.

## MAINTENANCE

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- 6.9 The question of maintenance, both of cemeteries as a whole and of individual gravesites, has been a concern for many decades and loomed large in our Local Authority Survey.<sup>229</sup> Cemeteries involve a mixture of public and private interests, including those of local government, ratepayers, religious and voluntary groups, and private individuals. The rights and duties applying to each party are not always clear.
- 6.10 Before discussing the issues raised with respect to maintenance and long-term protection of individual gravesites and memorials, we outline in more detail the key provisions that currently determine the rights and responsibilities of the various stakeholders.

### The Legal Situation

- 6.11 Section 9(d) of the Burial and Cremation Act 1964 (the Act) specifies that any person who has paid the prescribed fee and lawfully erected a monument or tablet in the cemetery, shall be entitled:
- ... to maintain such grave, vault, monument, or tablet according to the terms of such permission to and for the sole and separate use of such person and his representatives and successors in perpetuity, or for the time limited in such permission.
- 6.12 Section 9(f) allows local authorities themselves to enter into agreements to maintain graves, either in perpetuity or for a specified period.
- 6.13 Reflecting Parliament's concerns in 1964 about the risk unstable monuments and tablets posed to workers and the public, section 9(h) requires local authorities to make the monument or tablet safe or take down or remove any structure that has become unstable.<sup>230</sup>

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<sup>229</sup> Law Commission "Survey of Local Authorities" (November–December 2010) [Local Authority Survey].

<sup>230</sup> These powers and responsibilities are supplemented by s 16, which affirms the local authorities' own bylaw making powers which are used to further prescribe the rules by which a cemetery will operate and the penalties that will apply for breaches of these rules.

- 6.14 Section 20 also provides local authorities with wide discretionary powers to clear, clean, tidy and repair any “closed or otherwise disused or derelict cemetery or other place of burial”.<sup>231</sup> The manner in which local authorities are to exercise these powers is set out in the Burial and Cremation (Removal of Monuments and Tablets) Regulations 1967. The regulations require the authority to notify the person entitled to maintain monument or tablet providing them with an opportunity to undertake the remedial work themselves.<sup>232</sup> If the person entitled to maintain the grave cannot be identified or found, or fails to undertake the work, the local authority must advertise their intention to carry out the task in a newspaper circulating in the area in which the cemetery is located.<sup>233</sup>
- 6.15 In addition, any work relating to gravesites which pre-date 1900 is subject to the provisions of the Historic Places Act 1993. Under this Act, any place in New Zealand that was associated with human activity that occurred before 1900 is categorised as an “archaeological site”.<sup>234</sup> It is unlawful for anyone who has not been granted a specific authority under the Act to:<sup>235</sup>
- ... destroy, damage, or modify, or cause to be destroyed, damaged, or modified, the whole or any part of any archaeological site, knowing or having reasonable cause to suspect that it is an archaeological site.
- 6.16 Furthermore, section 45(2A) of the Act requires anyone proposing to clear monuments or tablets from a closed cemetery or burial ground to notify the New Zealand Historic Places Trust of their intention to do so.

### Issues arising

- 6.17 It is evident from our preliminary consultation and responses to our Local Authority Survey that not all stakeholders feel the existing legal framework is providing an effective mechanism for resolving the sometimes conflicting interests inherent in decisions about the maintenance of cemeteries and graves, and the preservation of historic sites.
- 6.18 The most significant problem relates to the management and maintenance of cemeteries and burial grounds that have reached full capacity and have been closed for further burials or are only open for ash interments. These cemeteries and burial grounds contain some of the most historically significant gravesites in New Zealand.
- 6.19 Once a cemetery or burial ground has reached its full capacity it ceases to generate income. Without access to alternative funding and resources, or an explicit legal obligation, disused cemeteries and burial grounds tend to deteriorate. Yet in almost all cases the landowners, be they a public or religious entity, have contracted to provide a “right to perpetual interment”.<sup>236</sup> They may not disturb the remains or dispose of the land except in certain prescribed circumstances. In a preliminary submission the Historic Cemeteries Conservation Trust of New Zealand expressed concern at what it described as the “very variable” management of historic cemeteries, claiming most local authorities were “just doing the bare essentials, and no conservation work at all.”<sup>237</sup>
- 6.20 On the one hand, this might suggest the need for more effective ways to protect our heritage burial sites, but equally it might suggest that as a society we are ambivalent about the value we

231 Cemetery trustees and managers of denominational burial grounds have the same powers over burial land under their control.

232 Burial and Cremation (Removal of Monuments and Tablets) Regulations 1967, reg 3.

233 Regulation 4.

234 Historic Places Act 1993, s 2.

235 Section 10.

236 That is, the right for the body to remain in that gravesite forever.

237 Preliminary submission of the Historic Cemeteries Conservation Trust of New Zealand (8 February 2011) at [1].

place on the active preservation of land used for burial, particularly when it has direct fiscal implications for ratepayers.

- 6.21 Depending on which of these perspectives best reflects the public's attitude, the law may be required to ensure burial sites are actively maintained and their heritage and amenity values protected, or it might impose a much less onerous obligation to leave the land undisturbed and refrain from interfering with the monuments and graves.
- 6.22 Eco-burials also challenge established ideas about the maintenance of cemetery land. In an eco-burial, individual gravesites are not maintained, and when the cemetery reaches capacity it becomes conservation land. The long-term protection of the land will arise as much from its conservation status as its cemetery status.
- 6.23 Local authorities differ in their approach to the management of closed cemeteries. Some closed cemeteries are actively maintained as historical public reserves, while others are neglected. There is similar variation among trustee-managed cemeteries. This is primarily an issue of resourcing and priorities.<sup>238</sup> The Act does not establish minimum standards of maintenance, and those responsible for cemetery management may have different views about the appropriate standards of care. In the absence of a statutory obligation, many local authorities choose not to prioritise cemetery maintenance, and some cemeteries receive no maintenance work at all.
- 6.24 A good example of these issues can be seen in relation to the closed public and Jewish cemeteries on Symonds Street in Auckland. Local residents have long expressed concern that the Auckland Council has not given adequate attention to maintaining these cemeteries, despite their historical and cultural significance.<sup>239</sup> In the reallocation of roles under the Super City structure, the Waitemata Local Board has argued that closed cemeteries should be managed as local parks. The Local Board Plan 2011 states that “[t]his historical treasure is falling into disrepair and we intend to restore it through an enhanced maintenance programme and revegetation.”<sup>240</sup> While the financial burden of maintenance is common to many districts, it has become particularly acute for the Christchurch City Council in the aftermath of the series of earthquakes that have struck the region since September 2010. Tens of thousands of headstones and memorials were either broken or displaced by the earthquakes. At the time of writing, we were told that “make-safe” work within the council’s cemeteries has cost \$450,000 to date and it was anticipated an additional \$250,000 would be needed to complete the work.<sup>241</sup>
- 6.25 The severity of damage to the historic Lyttelton cemetery is such that restoration is unlikely to be viable and the worst affected portion of the cemetery is likely to be closed off. Work is now underway to identify and scope damage to the most significant historic graves and sections of older cemeteries affected by the earthquakes and to prepare a plan for restoration over time. The council has allocated three million dollars over the next three years for the restoration of heritage graves and was working with a number of community groups interested in assisting in the restoration work in various ways.<sup>242</sup>
- 6.26 It appears that in most parts of New Zealand, local authorities have adopted the position that the responsibility to maintain individual gravesites rests with the person who has paid for, and been granted permission, to make the grave and erect the memorial (or following their death, their relatives and successors). In other words the “entitlement” to maintain created

238 Law Commission “Survey of Cemetery Trustees” (April 2012) [Cemetery Trustees Survey].

239 See for example Brian Rudman “Historic cemetery deserves to be resurrected” *The New Zealand Herald* (online ed, Auckland, 16 July 2012).

240 Waitemata Local Board, Auckland Council *Local Board Plan 2011* (October 2011) < [www.aucklandcouncil.govt.nz](http://www.aucklandcouncil.govt.nz) > at 28.

241 Email from John Revell (Christchurch City Council) to Law Commission regarding monument repair costs (2 September 2013).

242 Above n 241.

by section 9(d) of the Act is interpreted as creating a duty rather than a right. We are aware that some local authorities believe they do not have the legal right to repair damaged graves (as distinct from making safe, or clearing) without the explicit permission of the person who has the entitlement under the Act.<sup>243</sup> However, in many cases there are no known successors with an interest in the maintenance or restoration of these sites, potentially jeopardising the preservation and restoration of significant gravesites.<sup>244</sup>

- 6.27 Without wishing to minimise the financial implications, we consider that many New Zealanders would agree that closed cemeteries should not be permitted to become derelict and semi-abandoned. Cemeteries have the potential to provide valuable open space, but this potential will not be realised if they are not properly maintained. In chapter 7 we invite submissions on the merits of establishing minimum maintenance standards for closed cemeteries, to address this issue. We also wish to see greater discussion of options for private sector and community involvement in the preservation of historic cemeteries and burial grounds, for example through more effective use of long-term maintenance contracts and arrangements with “Friends of Cemeteries” organisations.

### Security and vandalism

- 6.28 As mentioned in chapter 1, there have been occasions when cemeteries and individual graves have been targeted by vandals. The most recent case involved the desecration of graves in the Jewish section of Auckland’s Symonds Street Cemetery.<sup>245</sup>
- 6.29 New Zealand does not have a specific offence of desecration of graves or damage within cemeteries. From 1877 to 1964, provisions of this sort were contained in the various pieces of legislation governing cemetery management. For example, the Cemeteries Management Act 1877 provided that any person who “wilfully or wantonly” destroyed a monument was guilty of a misdemeanour and liable to imprisonment for up to three months or a fine of up to 20 pounds.<sup>246</sup> However, by the time the Burial and Cremation Act was drafted, Parliament had recently completed the revision of the criminal code, bringing together miscellaneous crimes into the Crimes Act 1961. Desecration provisions were not carried through to the new Burial and Cremation Act, although it would be possible for local authorities to impose fines for damage through a cemetery bylaw. We seek public feedback on whether current provisions are adequate.

## LAND CLASSIFICATION – IMPLICATIONS FOR MANAGEMENT AND CONTROL

- 6.30 In the following discussion we consider whether the current legislative framework provides the clarity required to ensure effective long-term management of our places of burial as circumstances change over time. We begin with the issues that arise over the legal status of the land on which burials have taken place, and the implications for the differences for long-term management and possibilities of alternative use. We then consider the particular issues that arise for trustee-managed cemeteries when trustees wish to transfer control to

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243 In October 2002, the Timaru District Council’s Cemeteries Review Subcommittee sought clarification as to whether the council itself or volunteer groups were legally entitled to undertake repair work on damaged monuments. The opinion concluded that although initially purchased by the deceased person or their estates, the actual ownership of memorials vested in the Council by virtue of their becoming fixtures to the land once installed. It stated this view was supported by the wording of the Burial and Cremation Act 1964 which referred to an “entitlement to maintain” in s 9 as opposed to a right of ownership. It advised that the Council had the right and in some circumstances an obligation to undertake repairs.

244 Grave maintenance is already a pressing problem and is likely to worsen as older concrete headstones become increasingly unstable and have not yet been restored. Once these graves are restored, it may be less of an issue in future, due to more modern modes of memorialisation and restrictions contained in most cemetery bylaws.

245 Brendan Manning “‘Vile’ desecration of Jewish headstones” *The New Zealand Herald* (online ed, Auckland, 19 October 2012).

246 Cemeteries Management Act 1877, s 26.

local authorities, given the particular heritage value of these cemeteries and the idiosyncratic management arrangements under which they operate.

### Status of burial land and long-term management

- 6.31 As discussed in chapter 3, New Zealand’s early burial law sought to bring all land used for burial under the umbrella of one statutory regime, irrespective of how the land was originally set aside or the management arrangement in place. However, the legislation has never included a requirement that land used for burial be protected by any legal caveats or that the certificate of title include reference to the land’s status as a burial ground or cemetery.<sup>247</sup>
- 6.32 Respondents to our Local Authority Survey were not always able to provide comprehensive information about the underlying legal designation of land used for cemeteries in their districts. Often the land had been classified as cemetery reserve and is subject to the Reserves Act 1977. In other cases land may have been donated by the Crown or obtained under the Public Works Act 1981 or the Local Government Act 1974. One of the ramifications is that cemetery status is not always noted on the title and is not noted in a consistent form when it is recorded.
- 6.33 Although not required by the Act, our Cemetery Trustees Survey revealed that many trustee-managed cemeteries do have a notation on the certificate of title.<sup>248</sup> This is most commonly the result of reserve status under the Reserves Act 1977. We believe it is also likely that some trustee-managed cemeteries meet the definition of “reserve” but the certificate of title has never been properly updated to reflect this status. Under the Public Reserves and Domains Act 1908, existing cemeteries were classified as reserves. Several iterations of reserve legislation have interposed, but each new statute has defined “reserve” so as to include reserves set aside under predecessor legislation. As a consequence, legacy trustee-managed cemeteries are generally within the definition of reserves. Land which has been classified as “reserve” should be, in theory, subject to the planning and management requirements of the Reserves Act, creating another layer of administrative complexity for trustee-managed cemeteries. In practice, it is our understanding that the Department of Conservation, which administers the Reserves Act, does not follow up with trustee-managed cemeteries to ensure that they are meeting their obligations as administering bodies of reserves.

### The problem

- 6.34 The ambiguous, unusual, and complex legal status of land used for burial does not necessarily cause day-to-day management problems. However, the different legal classification of the land, or in some cases the lack of clarity as to the land’s status, causes problems and potential conflicts between different statutory regimes in a number of areas. The lack of clarity as to the legal status of land used for burial can also create more serious problems when decisions are being made to either transfer the ownership and/or management of such land to another party, or to divert unused portions for another purpose.
- 6.35 Under the Act different rules apply to the sale and diversion of land used for burial depending on whether it is a “cemetery” or a “burial ground” (as defined in the Act). The rules that apply to the sale or diversion of cemetery land that is unused and surplus to requirements also differ depending on whether that land is subject to the Reserves Act, the Public Works Act or under the control of a trustee-managed cemetery.<sup>249</sup> Hence, difficulties can arise if the land’s legal designation is unknown or disputed.

247 Other than new denominational cemeteries.

248 Cemetery Trustees Survey, above n 238.

249 Burial and Cremation Act 1964, s 21(3).

- 6.36 The default position is that cemeteries and burial grounds which have reached their capacity and are closed for further burials should not be “sold or leased or otherwise disposed of or diverted to any other purpose.”<sup>250</sup> However, under section 44 the Minister of Health has a discretionary power to waive this provision in the case of burial grounds. Cemeteries, on the other hand, cannot be legally alienated or diverted to an alternative use, except by an Act of Parliament.<sup>251</sup> The different regimes reflect the fact that burial grounds are established on private land. Cemeteries managed by trustees can be transferred to a local authority, under a separate process discussed in more detail below.
- 6.37 On the rare occasions when a cemetery or burial ground is cleared for alternative use, it is the practice in New Zealand to disinter all remains and rebury them in another cemetery. This may often be the preference of the families of the deceased, but in addition it is usually necessary because of planned earthworks. A recent example is the clearance of the Westney Road Methodist burial ground to provide for an extension of Auckland Airport. In 2005, a notice was issued closing the burial ground and exempting it from the restrictions on alienation, with the condition that tablets, monuments and remains were cleared. After the burial ground was closed, the Airport worked with the descendants of persons buried to arrange for disinterment and reburial elsewhere, mostly in the nearby Mangere Lawn Cemetery. If this had been a public cemetery, and not a burial ground, legislation would have been required to authorise the change in use.
- 6.38 The Act sets out a complex and multi-layered process for dealing with cemeteries and burial grounds that cannot accommodate further burials, or that need to be closed for other reasons. The process begins when the Minister of Health issues a “closing order” for the cemetery or burial ground. As part of this closing order, or at a later date, the Minister can vest the control and management of the cemetery or burial ground in a local authority or any other individual or body corporate for the purpose of ensuring it is “maintained in good order” and remains accessible to the public. The Minister also has the power to order the removal of monuments and tablets in a closed cemetery or burial ground. If this occurs, the initiator of the action, whether a local authority or a body corporate, must give public notice of the clearance and must send a copy of the notice to the Historic Places Trust.
- 6.39 In theory at least, each of these steps, from the issuing of the closing order to the delegation of control and management responsibility to another party, must be notified in the *Gazette*.<sup>252</sup> In practice, however, our research indicates that historically the processes have not always been followed and/or the documentation, which might establish which, if any, of the processes have been undertaken, cannot always be found. The picture is further complicated in situations where there is uncertainty as to whether the land is subject to the “cemetery” or “burial ground” regime.
- 6.40 In the course of this review there have been a number of instances in which burial grounds have been put up for sale, often in conjunction with the sale of deconsecrated churches and their surrounding land. In some cases the appropriate steps have been taken in advance of the sale to sub-divide and protect the land used for burial, but in others the sale process has given rise to a number of legal and policy issues. In one case, ownership of a denominational burial ground in Canterbury was transferred to a private company, which undertook a number of burials before the Ministry issued a closure order because it regarded the conversion to a private

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250 Sections 43 and 44.

251 For example, the bisection of Bolton Street Cemetery in Wellington for a motorway was authorised by the Finance Act (No 2) 1967, s 6.

252 Burial and Cremations Act 1964, ss 41, 44 and 45.

cemetery as ultra vires.<sup>253</sup> In another case, a deconsecrated church in Devonport was put up for sale together with the closed burial ground containing historic graves, some of which were unmarked. The proposed sale initially met with strong opposition from members of the local Devonport community.<sup>254</sup> However, the vendors consulted with the relevant stakeholders and worked with the Ministry of Health to ensure that all land in which burials had taken place was excluded from the sale. The old burial ground was recently gifted to the Auckland City Council.<sup>255</sup>

- 6.41 We are also aware of one instance in which a local authority fell foul of the restrictions on alienation. In 1995, the Waitakere City Council decided that an undeveloped portion of the Waikumete Cemetery should be sold for the purposes of a residential subdivision. The subdivision proceeded and houses were built on the land. However, the reserve status and cemetery status of the land was not removed, meaning that the subdivision was of questionable validity.<sup>256</sup>
- 6.42 These examples demonstrate a number of issues. As seen in the clearance of the Westney Road burial ground, the apparently strong statutory restrictions on the alienation of burial grounds can be overridden by an exemption from the Minister of Health. The process for receiving an exemption is not transparent and does not provide for a public hearing. The sale of unused cemetery land at Waikumete demonstrates the pitfalls of the current law for local authorities seeking to manage their cemetery assets, which can include land adjacent to a cemetery but not yet used for burial.
- 6.43 In addition, the various attempts to sell land used for burial in conjunction with church property illustrates the difficulties in both applying and enforcing the existing legislation when there is a lack of clarity as to the status of the underlying land and the historic decisions which have been taken over its control and management.

### Trustee-managed cemeteries

- 6.44 As discussed earlier, it appears that at the time the Act was passed it was envisaged that trustee-managed cemeteries would all eventually enter into local authority management.<sup>257</sup> In practice, the transfer of ownership and management of these historic cemeteries often appears to have been both legally cumbersome and somewhat haphazard.
- 6.45 Many local authorities have taken over the management of cemeteries that were formerly operated by trustees, as provided for by section 23(3) of the Act. However many commented that it was not always clear under what authority the council had assumed responsibility for these properties, nor, in some instances, the legal ownership and status of the underlying land.

253 Internal Briefing to the Director-General of Health regarding proposed closure of Raithby Burial Ground (18 April 2008).

254 Sarah Coddington "Fears for graves in church sale: survey will check for lost human remains" *Stuff* (22 November 2011). < [www.stuff.co.nz](http://www.stuff.co.nz) >

255 Email from Sally Gilbert (Manager Environmental & Border Health, Ministry of Health) to Law Commission regarding St Paul's (Presbyterian) Burial Ground, Devonport (27 August 2013).

256 Section 49 of the Reserves and Land Disposals Bill 2007 is intended to rectify this, by providing:

**49 Reserve status of Waikumete cemetery land revoked:**

- (1) The reservation of the Waikumete cemetery land as a reserve for local purpose (site for cemetery) is revoked.
- (2) The revocation of status under subsection (1) must be treated as if—
  - (a) it occurred under section 24 of the Reserves Act 1977; and
  - (b) the requirements of that section were satisfied; and
  - (c) section 25 of the Reserves Act 1977 does not apply to the land to which the revocation relates.
- (3) The dealings referred to in section 48(4) are valid and have always been valid despite section 112 of the Reserves Act 1977.

257 See above n 170.

- This lack of clarity over the legal status of the land and the origin and nature of the council's delegated authority was often problematic.<sup>258</sup>
- 6.46 Part of the difficulty is that the Act does not provide a process for transfer of management as such. Instead, it provides that the Governor-General may appoint a local authority to have control or management of a cemetery if the trustees number less than three.<sup>259</sup>
- 6.47 Section 53 addresses the issue of vesting the underlying title. Neither section 53 nor section 23 provides any guidance to trustees or local authorities wishing to transfer management. In addition, consent of the local authority is required, which could pose an obstacle to effective transfer in some cases. The risk is that the lack of effective transfer provisions will result in cemeteries that have no responsible manager, for example if trustees die without appointing replacements. There is also a risk that the cemetery management will be informally transferred but outstanding issues such as caveats or undissolved trusts will remain a barrier to full transfer and effective management.
- 6.48 This scenario occurred for the Pauatahanui Burial Ground in Porirua and was ultimately resolved only through a local bill promoted by the Porirua City Council. The Pauatahanui Burial Ground was set aside as a cemetery by the Stace family in 1856. The first burial occurred in 1860, and the cemetery was managed by trustees as a public cemetery for almost 150 years. In the notice giving effect to its closure in 2004, it is referred to as a denominational burial ground.
- 6.49 However, as the land was set aside prior to the Cemeteries Management Act 1877 and operated as a place for the burial of the dead generally,<sup>260</sup> it would appear that it was actually a trust-operated cemetery erroneously categorised as a denominational burial ground. When it came time to close the cemetery in 2004, after all the available plot space was used, the Porirua City Council realised that the trustees appointed under the Act had never been recorded on the certificate of title. The registered owners had long since died and the title remained subject to caveats. Legislation was passed in 2007 vesting the title in the Porirua City Council, removing the caveats, dissolving the trusts, and confirming council control and management.<sup>261</sup>
- 6.50 An additional example is Puhoi Cemetery. We have been advised by the Ministry of Health that the trustees wish to transfer the management of the cemetery, but there are difficulties in doing so because it is located on Crown land and is subject to the Reserves Act. Many still operative trustee-managed cemeteries are likely to have similar issues, suggesting a strong argument in favour of “cleaning up” the underlying title to better enable future transfer of control, when trustees so choose.
- 6.51 Section 22(3) of the Act provides a simpler process for the transfer of control of trustee-managed cemeteries that are on land vested in the local authority. Under this section, if due to resignation, death, or absence of trustees “there is at any time no person holding the office of trustee in respect of that cemetery”, the local authority will take over control of the cemetery.

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258 Respondents for the Christchurch City Council in our Cemetery Trustees Survey drew our attention to the fact that on a number of occasions since the passage of the Burial and Cremation Act Parliament has been forced to pass special statutes in order to vest ownership and control of moribund trustee-managed cemeteries in a local authority because the mechanisms provided under the current Act were inadequate. Survey respondents for the Whangarei District Council proposed that there be an updated register or database of all legacy trustee-managed cemeteries for which local authorities have delegation under s 23 of the Act (including delegations made under previous Acts).

259 Section 23(3) of the Burial and Cremation Act 1964 provides that  
[i]f the trustees of a cemetery to which this Part applies at any time number less than 3 the Governor-General may, instead of appointing trustees under this section, with the consent of a local authority, appoint that local authority to have the control and management of the cemetery as from a date to be specified, which date may be before or after the date of the making of the appointment.

260 See Porirua City Council “Historic Site: Pauatahanui Burial Ground and Rose Project” < [www.pcc.govt.nz](http://www.pcc.govt.nz) > .

261 Porirua City Council (Pauatahanui Burial Ground) Act 2007.

- 6.52 A further issue relates to the relationship between trustee-managed cemeteries and local authorities. It is quite clear that most trustee-managed cemeteries charge less for a plot than local authority cemeteries. As long as trustees and other members of the community are able to donate time to maintain the grounds and manage burials, this seems to meet the preference of the community. The difficulty arises at the point of transfer of management, if and when this occurs. The local authority will be bound to honour agreements for the pre-sale of plots, and although an interment fee can be charged, there is a risk that many trustee-managed cemeteries will end up becoming a liability for ratepayers. To some extent this is unavoidable, and a natural consequence of the way trustee-managed cemeteries were historically created. However, there may be a case for requiring improved accountability by local authorities to pre-empt problems arising with financial liabilities in relation to future transfers.

### PRELIMINARY CONCLUSIONS

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- 6.53 The issues raised in this discussion suggest the current legal framework for managing and protecting land used for burial is no longer suitable. Effective decision making about the long-term preservation of such land is too often hindered by the lack of clarity about the legal status of the land and the confusing interface between the Burial and Cremation Act, the Reserves Act and other legislation.
- 6.54 The restrictions on transferring ownership of land used for burial are primarily directed at preventing alternative use, rather than on promoting best-practice use and management. The question we raise for consideration and debate is whether legal protections should instead be focused on standards for management, irrespective of ownership. A secondary question is whether cemeteries should be required to adhere to minimum maintenance standards and if so, what these standards should require.
- 6.55 The regime for closing cemeteries and burial grounds is overly complex and in our preliminary view does not always address the appropriate public interests. While there are public health issues arising from the management of land used for burials, the more significant public interests that arise in the context of closing and preserving old cemeteries and burial grounds are conservation and heritage issues. However, under the current regime, these issues may not be adequately addressed. In addition, the ministerial decision-making power to close or permit the sale of burial grounds is discretionary and in practice is delegated to officials. It does not include formal notification and opportunity for public submissions.
- 6.56 As we have discussed, some of New Zealand's most historic gravesites are contained in the legacy trustee-managed cemeteries and so it is important to have efficient and nationally consistent systems for managing these cemeteries at the point at which their trustees are no longer able to do so. The current mechanisms for transferring ownership and control of such cemeteries, and ensuring their long-term preservation, are not optimal.

- 6.57 In our view, public debate is needed regarding reforming the legal framework for identifying, managing and preserving land used for human burial. As can be seen from our discussion of these issues, the legal framework controlling the ownership and management of land used for human burial must accommodate a range of public and private interests, some of which may be in conflict with each other and some of which will alter over time. In the period of consultation following this review we hope to receive a wide range of public submissions on these issues and these will guide the final policies and legal reforms we recommend to government in our Final Report. We consider that the framework needs to be flexible, robust and efficient, and must provide for the recognition and protection of cultural, heritage, community and environmental values.
- 6.58 In chapter 7 we outline our preliminary proposals for approaching the myriad policy issues raised in this and the preceding chapter.

# Chapter 7

## Reform options: a modern approach to cemetery management

### INTRODUCTION

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- 7.1 In the preceding chapters we provided a preliminary assessment of the problems and issues arising under the current legal framework. This chapter presents options for reform.
- 7.2 We begin by outlining the key elements of the proposed reform package and their underlying policy rationales. The options we put forward for public consultation in this chapter range from fundamental policy reforms to technical legal changes. Some of the technical changes are necessary to support the new framework; other changes are more modest updates to bring our burial law in line with other statutes such as the Local Government Act 2002 and the Resource Management Act 1991.
- 7.3 The reforms we outline in this chapter are founded on the principles and policy drivers outlined in the introductory chapters to this Issues Paper. Specifically, our objectives are to ensure that all New Zealanders have access to appropriate burial options and that the range of public and private interests we have identified in the preceding chapters, including respect for fundamental human rights, are given adequate protection.
- 7.4 A second policy driver is to create a simpler and more certain allocation of roles and responsibilities within the cemetery sector, including between central and local government. In our assessment, the current law is vague, silent, or ambiguous in many places, which has the potential to create a range of problems.
- 7.5 Finally, it is our view that the management of cemeteries raises significant land use issues that are not being adequately addressed under the current law. We therefore consider that a further policy driver is to promote the sustainable management of cemetery land. This has informed our approach to the management of existing open cemeteries, the establishment of new cemeteries, and the management of closed cemeteries and burial grounds.

### OVERVIEW OF KEY REFORMS

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- 7.6 Our most significant reform proposal is to remove current restrictions on the establishment of new public cemeteries by providers other than local authorities. Our provisional view is that the local authority monopoly on cemetery provision can no longer be justified. There is no longer any obvious benefit or policy rationale for current restrictions that prevent communities of common interest from establishing cemeteries that would meet their burial needs. We therefore suggest that the legislation should provide for a new category of “independent cemeteries”, and a new management framework for these cemeteries.
- 7.7 We also propose that burial on private land in rural areas should be accommodated to a greater extent, subject to resource consenting. This appears to be an area in which the present restrictions do not align with reasonable public expectations. If our proposed reforms are

supported in principle, it would then become necessary to consider the consequential changes to the framework for cemetery management.

- 7.8 In addition to opening up the sector, we suggest that local authorities should be under an explicit obligation to make all reasonable efforts to accommodate requests for separate areas in public cemeteries, subject to capacity constraints. It is our further view that local authority bylaws should not pre-emptively rule out or unduly restrict the ability to provide separate areas in public cemeteries for religious or cultural groups. There is a strong argument that bylaws purporting to establish such restrictions are *ultra vires*, and we consider that this should be placed beyond doubt.
- 7.9 The remainder of our proposed reforms would realign the balance of roles between central and local government in the context of the burial law framework. This includes creating a new framework for trustee-managed cemeteries, moving the oversight role from central to local government. We consider that this is consistent with the role of local government under the Local Government Act<sup>262</sup> and would be a more efficient option.

### Legal tools to support new policies

- 7.10 To give effect to these policy changes and the underlying objectives, we propose a range of legal tools. Foremost amongst these is the development of a National Environmental Standard on the use of land for the burial of human remains. Section 43 of the Resource Management Act 1991 allows for the creation of these national environmental regulations, which can impose restrictions on the use of land. A National Environmental Standard would provide national consistency on matters such as minimum burial depth, burial on private land, and the assessment criteria for the establishment of new cemeteries including those that adopt the philosophy of “natural burial”.<sup>263</sup> It could provide that the burial of human remains other than in an area approved for human burial is a prohibited activity, engaging the offence provisions of the Resource Management Act. It could also provide that local authorities must identify areas within their region where establishing a cemetery is a prohibited, non-complying, or discretionary activity, and that an application for resource consent to establish a cemetery must be publicly notified.
- 7.11 In addition to a National Environmental Standard, existing resource management tools could be employed to impose land management restrictions on new cemeteries, supporting the proposal to allow greater flexibility in permitting alternative providers. In particular, consenting authorities could make use of the provisions in sections 108 and 108A of the Resource Management Act, which enable them to require a covenant and a bond as part of the resource consenting process. These could be used to support consent conditions requiring long-term maintenance and/or protection of land used for burial.
- 7.12 To mitigate any potential financial risks of introducing alternative new providers to the sector, we propose that independent cemeteries should be required to prepare independently audited financial statements, and must make these available to people wishing to purchase a plot.
- 7.13 In chapter 3, we identified some concerns relating to record keeping. This review provides an opportunity to address these concerns. We suggest that the cemetery status of land should be noted on the certificate of title for all cemeteries, and that local authorities should be required to review and update the Reserves Act 1977 classification of existing unclassified cemeteries.

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<sup>262</sup> Local Government Act 2002, ss 10 and 11.

<sup>263</sup> As explored in ch 5, there is increasing interest in this style of burial, which involves burial of un-embalmed bodies in shallow plots, with trees planted directly on top of the grave.

Cemetery managers would also be required to pass on records to the Department of Internal Affairs, in keeping with their role as the repository of records of births, deaths, and marriages.

- 7.14 Finally, we assess whether the expansive use of bylaws is appropriate. Bylaws are the chief tool currently adopted by local authorities to manage cemetery assets. It would appear that there is presently some inefficiency with different local authorities creating substantially similar bylaws, and we are also concerned that bylaws may at times be unnecessarily expansive and thereby interfere with plot holder rights. We also propose clearer statutory defaults giving greater detail about the legal rights that attach to a burial plot, together with a model contract for plot purchase.
- 7.15 We begin by explaining how our proposals to widen the burial options available to New Zealanders would work in practice, and the legal requirements and safeguards that would apply to different types of providers under our proposed new legal framework.
- 7.16 We then set out how the resource management framework and associated tools could be used to better protect land used for burial, including our historic cemeteries and gravesites. Finally, we address a number of legal and contractual issues that arise in the context of purchasing a right to interment.

## PROVISION OF PLACES FOR BURIAL

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- 7.17 In chapter 5 we reached the preliminary conclusion that New Zealand's current legal framework for provision of places for burial has become unnecessarily restrictive and does not always adequately protect fundamental rights such as the right to religious freedom and the rights of cultural minorities. In chapter 6 we considered how well the legal framework was protecting the private and public interests in the maintenance and preservation of land used for burial. We reached the preliminary conclusion that there were significant problems with the current law and a lack of alignment with other statutes.
- 7.18 We begin in this section by presenting a range of reform options relating to the provision of places for burial designed to address the inflexibilities we identified in chapter 5. We propose a new framework that will:
- retain the current obligation for territorial authorities to provide cemeteries when necessary, while clarifying that regional councils may also provide cemeteries;<sup>264</sup>
  - improve the framework for management of cemeteries by trustees; and
  - allow more flexibility for independent providers seeking to establish new cemeteries, and individuals seeking burial on private land, subject to resource management considerations.

### Obligations on providers of land for burial

- 7.19 Under the framework we propose in this chapter, there will be several different categories of land used for human burial. As well as the existing distinction between local authority cemeteries, trustee-managed cemeteries, denominational burial grounds, and urupā, there will also be a new category of independent cemetery, and burial on approved areas of rural private land is also likely to become more common.
- 7.20 One of the objectives of this review is to simplify the law in relation to land used for human burial. We therefore propose that, as far as possible, the management framework for different places of burial should impose consistent obligations and avoid a fragmented approach.

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<sup>264</sup> This would encompass unitary authorities.

However, some distinctions are necessary, such as that between private burial on rural land, and places of burial open to the public generally (whether provided as local authority cemeteries, trustee-managed cemeteries, independent cemeteries, or historic denominational burial grounds).

- 7.21 We propose that managers of all places used for human burial should have an obligation to:
- retain records of burial and pass these on to the appropriate local/national record-keeping authorities;
  - comply with all relevant provisions of the National Environmental Standard; and
  - update the certificate of title to ensure that the cemetery status of the land is adequately identified.
- 7.22 In addition, trustees, local authorities, and independent groups (including religious groups that currently provide denominational burial grounds) who provide places of burial must:
- not use the land for any purpose inconsistent with its status as a place for human burial;
  - maintain the grounds in a dignified and pleasant manner;
  - not mortgage the land;
  - be open for visiting by the general public free of charge;
  - when selling a new burial plot, ensure that the contract for sale addresses certain prescribed matters;
  - when seeking to close the cemetery or burial ground to further burials, apply to the Environment Court for a closing order; and
  - not divert a closed cemetery or burial ground to any other purpose except with consent of the Environment Court.
- 7.23 Finally, all new places of burial other than new local authority cemeteries would require resource consent – providing an opportunity for the consenting authority to consider land use issues and impose appropriate consent conditions.

### **Cemeteries provided by local authorities**

- 7.24 We propose that local authorities would continue to play a central role in the provision of cemeteries. New legislation would retain the statutory obligation on local authorities to provide sufficient cemeteries to meet demand in their district.
- 7.25 However, in some regions it may be more appropriate for new cemeteries to be provided jointly by neighbouring local authorities, or by a regional council as a regional park.<sup>265</sup> This could be provided for in the legislation, which could also clarify that the obligation to provide cemeteries may be delegated within a territorial authority structure so that, for example, neighbouring community boards in different districts could jointly provide a cemetery where this would better meet the needs of their residents.
- 7.26 The combination of a more mobile population, improved transport, the ready availability of refrigeration and embalming, and the general desire for greater personalisation in decisions around funeral practices, suggests that out-of-district burial is likely to become more common. Better regional co-operation could enable neighbouring districts with low populations to take

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<sup>265</sup> The joint provision of cemeteries by more than one local authority is currently enabled by s 25(3) of the Health Act 1956, but requires the approval of the Director-General of Health.

advantage of economies of scale in cemetery provision, and could provide more effectively for the burial of city-dwellers. Giving regional councils the power to establish cemeteries might help promote increased choice, and would be within the existing parks management mandate of these authorities.

- 7.27 As a matter of best practice, local authorities should consult both formally and informally in making decisions about the management of any public asset. However, we do not think that additional statutory requirements are necessary to better facilitate this. We suggest however that local authorities should be required to consider and review the reserve status of their cemeteries, as many old cemeteries have never been reclassified under the Reserves Act 1977. For some cemeteries, this may result in a requirement for a reserves management plan after the new classification is established.
- 7.28 We also propose that legislation should contain more detail about providing separate areas within cemeteries for different sectors of the community. We anticipate that there may be less demand for separate areas once it becomes simpler to establish independent cemeteries. Yet this should not preclude the option of separate areas within public cemeteries. While we are of the view that a local authority monopoly is no longer justified, the historic policy rationales of encouraging local authority provision and discouraging small cemeteries remain compelling. Our earliest burial law was concerned that the proliferation of small cemeteries was inefficient and interfered with the productive use of land. Public cemeteries were intended to address this: diversity within these cemeteries was the corollary, and is an important feature of our current burial law, which reflects an admirable commitment to pluralism and respect for different cultural and religious needs. Furthermore, as we discussed in chapter 5, we are of the view that an essential public service such as cemeteries should be provided in a way that is responsive to public needs.
- 7.29 We acknowledge that providing separate areas creates difficulties for local authority cemetery managers. We do not suggest that every request could be accommodated. However, local authorities should be required to genuinely consider requests from sectors of the community for separate areas, and work with the group requesting the area to accommodate their burial needs subject to statutory conditions and criteria. Providing more detail in the statute could help local authorities make these decisions, therefore we propose the statute would provide as follows.
- (a) The group requesting the separate area must be able to demonstrate that there is sufficient demand within the community for that style of burial, and that this is not otherwise provided for at a nearby public cemetery.
  - (b) The cemetery manager may refuse the request if the cemetery has fewer than 20 years' capacity.
  - (c) The cemetery manager may refuse the request if the cemetery has more than 20 years' capacity but fewer than 50 years' capacity, and granting the request is likely to significantly alter the projections around the general capacity of the cemetery.
  - (d) A cemetery manager may impose reasonable conditions relating to the size, location and development of the area.
- 7.30 We also propose that local authorities should be required to proactively consider the different burial preferences of their communities when establishing new cemeteries, or as new areas are developed within existing cemeteries.
- 7.31 A further option would be to allow plots to be pre-purchased in bulk by community groups and developed as they see fit. Alternatively, local authorities could contract out management

of small areas within a cemetery to community groups. This might be preferred by cemetery managers as it would limit the financial risk associated with setting aside separate areas. Local authorities are concerned that separate areas might not be used at a rate equivalent to the general area, potentially leaving some plots unused by the time the cemetery as a whole is closed. If plots were pre-purchased, or if the management of a separate area was contracted out, the community groups who would benefit from the separate area would bear a greater share of the financial risk. If this option was adopted, we suggest it might be necessary to consider safeguards against community groups' on-selling plots at a profit. Conversely, it would also be necessary to ensure that local authorities did not take advantage of these community groups and charge higher prices for bulk pre-purchase. We invite submissions on this option.

### Trustee-managed cemeteries

- 7.32 This section presents a reform option that endeavours to:
- clarify the legal status of trustee-managed cemeteries;
  - provide for simpler management and oversight structures; and
  - simplify the transfer of management to local authority control when this is desired by the trustees and the local community.
- 7.33 Local authorities cannot be expected to actively maintain several very small local cemeteries among a dispersed population, yet these sorts of cemeteries clearly fill an important community need.
- 7.34 In our Cemetery Trustees Survey, we asked whether trustees would like to see control of the cemetery pass to the local authority. It was apparent from responses that many trustees were strongly opposed to the idea of local authority transfer, while others were actively exploring the option.
- 7.35 We propose that the statute should create a new category of "Community Cemetery". Existing trustee-managed cemeteries would be transferred across to this framework. This framework would retain key aspects of the current approach to trustee-managed cemeteries, such as the requirement to have three trustees, but would clarify the legal nature of these cemeteries and update the terminology to more accurately reflect the way these are managed.
- 7.36 The precise legal status of each of these cemeteries has become increasingly blurred across the years, and it is appropriate now to bring in a framework that clarifies this important matter, and reflects the fact that existing trustee-managed cemeteries have their roots in a form of devolved management under the Cemeteries Act 1882, and most do not operate subject to a deed of trust. We suggest that a devolved management model continues to be suitable for these cemeteries. Under this approach, the trustees would remain wholly responsible for cemetery management until such time that they decide to transfer the management to the local authority.
- 7.37 Full management responsibility would be exercised by the trustees, including the power to set plot prices and establish terms and conditions for the sale of burial plots. Trustees would be appointed by the local authority, rather than by the Governor-General. The local authority would alternatively be able to appoint a registered charitable trust<sup>266</sup> to manage the cemetery if this was considered more suitable, in which case the trustees of the charitable trust would have the rights and responsibilities of cemetery trustees. Existing trustees of current trustee-managed cemeteries would be deemed to be appointed as trustees of community cemeteries under the new provisions.

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266 That is, a charitable trust that has been incorporated under the Charitable Trusts Act 1967 and registered under the Charities Act 2005.

- 7.38 New legislation would vest the underlying title to community cemeteries in the relevant local authority, to allow for more effective transfer when this is desired. This legislation would address the current problem that some trustee-managed cemeteries are on Crown land, some are on local authority land, some are vested in the active trustees, and a small proportion are vested in trustees who are no longer alive. Alternatively, if the local authority has appointed a registered charitable trust rather than individual trustees, the underlying title could be vested in the trust. This would be an alternative way of providing the desirable outcome of long-term continuity of legal title, but it would also enable greater independence in the management of these cemeteries. In this instance, additional provisions would be needed to allow transfer of land to the local authority when the trustees so determine.
- 7.39 Trustees would be able to resign their position by giving notice to the other trustees and the local authority. When this occurs, the local authority would be required to appoint a replacement in consultation with remaining office holders. However, if the trustees collectively resign, the local authority may either appoint new trustees, or take over direct management of the cemetery. In determining whether or not to appoint new trustees, the local authority should be required to consult with the local residents. We suggest that local authorities are best placed to determine the level of community consultation required before new trustees are appointed, based on the circumstances of their district.
- 7.40 In addition, the local authority would have oversight of financial performance. Trustees would be required to submit financial records to the local authority. This would replace the existing requirement for yearly auditing of accounts by the Office of the Auditor-General. The local authority would also be required to retain records of all burials within community cemeteries in their region. There would also be a need to register the cemetery status on the certificate of title for the underlying land; unfortunately, this is not consistently the case at present.
- 7.41 Finally, we propose that this model could also be adopted for cemeteries currently under the direct control of local authorities. We consider that it could be a useful alternative to closing small, rural cemeteries against the wishes of local residents. Local authorities would be empowered to designate an existing local authority cemetery as a community cemetery and appoint trustees, where considered appropriate and taking into account the views expressed in community consultation.

### Independent cemetery provision

- 7.42 We propose that new legislation should permit independent cemeteries to be established, subject to land use considerations and financial restrictions. This would replace the current provisions that allow for denominational cemeteries to be approved by the Ministry of Health.<sup>267</sup>
- 7.43 While we consider that local authorities should continue to play a central role in the provision of cemeteries, we also think that many of the issues explored in this Part could be resolved by adopting a less restrictive approach to alternative providers. It is not reasonable to expect local authority cemeteries to be everything to everyone; nor should we unnecessarily restrict the diverse choices of members of a pluralistic society. It could also be argued that if new providers were able to operate cemeteries, this would ease the burden on local authorities.
- 7.44 Under this proposal, independent cemeteries could be established either for the public generally, or for particular groups within the public – including religious groups. Independent cemeteries for the general public could set aside areas for different denominations. For example, a cemetery

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<sup>267</sup> Burial and Cremation Act 1964, s 31.

- could be established jointly by an interfaith group that considers its different particular religious needs are not being adequately met in local authority cemeteries.
- 7.45 The detail of this reform option has been developed on the basis that legislation should focus on protecting the underlying land and facilitating standards of maintenance and service provision, rather than imposing restrictions on who may operate cemeteries. However, at the outset we note that the extent to which the sector should be opened up is yet to be determined. Some members of the community may feel more comfortable with an option that allows for new cemeteries to be established by registered charities<sup>268</sup> but not by other entities. We invite submissions on this issue.
- 7.46 Any move to open up the cemetery sector would be a potentially significant change to New Zealand's burial practice, and therefore it is particularly important that we assess whether this option is supported by the public. We welcome all submissions on the overall option of allowing a greater range of alternative providers, as well as the details of how this reform could be given legal effect.
- 7.47 As we discussed in chapter 5, the current provisions allowing the establishment of burial grounds by denominational groups are problematic in contemporary New Zealand. These provisions do not adequately protect the rights of New Zealanders to manifest their religions or beliefs, or to enjoy their cultural practices. The current provisions allow burial grounds to be established by religious groups but not by other equally deserving community sectors that lack a religious connection. Such groups could include ethnic groups that do not share a common religious basis but do share common burial practices, or environmental organisations seeking to establish an eco-burial ground.
- 7.48 Notwithstanding the strong arguments in favour of allowing independent cemeteries, they raise several risks that are absent when local authorities establish new cemeteries.
- 7.49 The first relates to the immediate effects of this use of land. In our Local Authority Survey, many expressed concern that private providers may not meet sufficiently high environmental standards and may provide inadequate ongoing maintenance. Concern was also expressed about the potential suitability of a given site for cemetery purposes. For example, regional councils may have concerns about leaching of embalming chemicals if a site is close to waterways, while territorial authorities will understandably wish to ensure that cemeteries are located appropriately with regard to the zoning of the site.
- 7.50 In our view, these issues can be addressed through the resource consenting process. We suggest that this could be achieved through the proposed new National Environmental Standard on burial of human remains. The resource consent process is the appropriate forum for assessing the environmental effects, including amenity effects, of different uses of land. Requiring notification would mean the public will have an opportunity to submit, ensuring adequate consideration of the effects on the local community. Local authorities could also impose resource consent conditions, such as a condition requiring planting to screen the cemetery from adjacent land.
- 7.51 The second risk is the long-term protection of land. This could also be addressed through the resource management framework, and made compulsory through the proposed National Environmental Standard. For example, conditions of consent could require a covenant with the local authority for long-term protection of the land. More generally, new legislation could

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268 The Charities Act 2005 provides for the registration of charitable entities.

impose an obligation on cemetery managers to maintain the grounds in a dignified and pleasant manner.

- 7.52 A further risk is financial failure. Our research suggests that local authority cemeteries are largely subsidised by rates, and trustee-managed cemeteries are subsidised by volunteer labour. The two cemeteries in New Zealand that are fully cost-recoverable are Purewa Cemetery and Mangere Lawn Cemetery: and both have the good fortune to have been established over a century ago near the centre of Auckland, ensuring steady demand for cemetery space.
- 7.53 It is arguable that safeguards should be required to ensure new cemeteries are well-managed and retain funds from plot sales for maintenance once the cemetery is closed. At the same time, requirements should not be too prescriptive or onerous: the restrictions imposed must be consistent with the underlying rationale of providing a wider range of cemeteries to meet the diverse needs of the public.
- 7.54 Overseas experience suggests that the management of for-profit cemeteries is particularly fraught with difficulties. There is an inherent tension between providing for the perpetual maintenance of an asset that will eventually cease to generate revenue, while also making sustainable profit for shareholders. Recent reviews of cemetery provision in the United Kingdom have determined that commercial cemetery companies established in the late 19th century have largely failed, with many entering liquidation shortly after the cemetery reached full capacity and new income from plot sales ceased.<sup>269</sup> Some may consider this a further argument for limiting independent provisions to registered charities, which are subject to stringent financial reporting requirements.
- 7.55 However, restrictions on profit making are unlikely to be enough to mitigate financial risk. Both charities and companies face similar risks as to capitalisation at the outset, determining prices for plots, and projecting future demand. A further option would be to require cemetery providers to reserve a portion of plot sales for future maintenance. We support in principle all independent cemeteries establishing a maintenance fund, but requiring this to be achieved through reserving a portion from the sale of each plot raises issues. The experience of Purewa and Mangere Lawn cemeteries suggests that a maintenance fund can be established relatively near the end of a cemetery's lifespan and still provide sufficient funds for perpetual maintenance. Therefore, we propose a more flexible requirement, mandating that cemetery managers must prepare independently audited financial statements. These statements should demonstrate how income from plot sales will be managed to provide for an adequately financed perpetual maintenance fund by the time the cemetery is closed. Projections should be reviewed at least every five years and must be made available to persons wishing to purchase a plot.
- 7.56 The financial risks may be heightened if the cemetery land is mortgaged. We note that retaining the current prohibition on mortgaging cemetery land would be a significant restriction, and could limit the ability to establish independent cemeteries. However, the mortgagee sale of a cemetery is likely to be deeply distressing for families of those who are buried on that land, and we consider that there is a valid public interest in precluding this possibility. Establishing a cemetery is different from other major developments. The land becomes more than a private asset; it also acquires a unique status as a public domain with strong connections to particular private individuals. We consider that this needs to be acknowledged in the management framework for independent cemeteries, and that it justifies a more restrictive approach than that adopted for other land uses. We therefore suggest retaining the current restriction on mortgaging cemetery land.

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269 See Environment, Transport and Regional Affairs Committee *Eighth Report: Cemeteries* (HC 91-I, 2 April 2001) at [115].

- 7.57 We also suggest that local authorities should be able to require a maintenance bond under section 108A of the Resource Management Act when granting consent for an independent cemetery, depending on the circumstances of the new cemetery (for example, size and location). This would not prevent financial failure, but it would help the local authority to maintain the site if such a failure did occur. This requirement would also ease the financial burden if the property is eventually transferred to local authority control. Similarly, a protective covenant could run with the land and bind potential successors in title, creating a back-stop protection if the land is transferred.

### **Denominational Burial Grounds**

- 7.58 If our proposals to establish independent cemeteries to accommodate the needs of different sectors of the community were accepted, we would suggest removing the current provisions allowing for new denominational burial grounds, as faith communities would be able to establish cemeteries under the new model we are proposing. Denominational burial grounds would no longer be needed.
- 7.59 This leaves the question of how existing open and closed denominational burial grounds should be managed. During consultation we hope the owners of denominational burial grounds will express their views about possible future management arrangements for these special burial places, and protection of their heritage values. At this stage our preliminary proposal is for denominational burial grounds to gradually transition to the new framework for independent cemeteries. However, many of the requirements we are recommending for new independent cemeteries are dependent on a resource consenting process, and could not simply be applied to existing denominational burial grounds.
- 7.60 To deal with this problem we propose a two-step transition process. As far as possible, existing denominational burial grounds will be subject to the same requirements as new independent cemeteries. This includes the requirement to prepare independently audited financial statements and make these available to persons seeking to purchase a plot, if the burial ground is still open to new burials.
- 7.61 Under this option, legislation would also empower managers of these places of burial to enter into a covenant with the relevant local authority for permanent protection of the cemetery land. If such a covenant was entered into the land owners would be entitled to have existing caveats under section 31(4) of the Burial and Cremation Act removed by the Registrar-General of Land.
- 7.62 As indicated above, particular problems can arise if the managers of denominational burial grounds seek to sell the land. The authorisations required for sale of burial grounds have proved problematic on a number of occasions. We think these processes need to be improved to ensure the long-term protection of these sites once the original owners are no longer willing or able to continue managing them. The second element of our reforms for denominational burial grounds focuses on this stage. Under this option, a change in ownership would trigger a requirement to transfer to the framework established for independent cemeteries.
- 7.63 We suggest the proposed National Environmental Standard could provide that the transfer of ownership of a denominational burial ground is deemed to be a change in use from an historic denominational burial ground to an independent cemetery. The change in use would require a resource consent as a controlled activity (that is, consent must be granted, but conditions may be imposed). This would provide consent authorities an opportunity to impose equivalent conditions to those that would have been imposed at the outset for independent cemeteries. It also mirrors the arrangement under the Burial and Cremation Act where the Minister of Health can impose conditions when authorising a sale of part or all of a burial ground.

- 7.64 Most denominational burial grounds are associated with small rural churches, and where these are sold, the use of the cemetery land is usually a secondary consideration. Although there may be a significant change in the use of the church buildings – going from a public place of worship to a domestic residence, for example – these changes would not usually trigger a requirement for a resource consent under the current law. However, in our view, the nature of a denominational burial ground is fundamentally altered if the denominational group involved in its initial establishment ceases to be involved in its ongoing management. We therefore think it is appropriate to consider land management issues afresh.
- 7.65 As mentioned above in chapter 6, the sale of deconsecrated churches and associated burial grounds tends to be a matter of local public concern. A central agency is not ideally placed to consider the local ramifications. Given that many transfers will occur after burials have been discontinued, it is especially important to have a process that will allow long-term land management issues to be considered. Requiring a resource consent from the local authority would allow appropriate conditions to be imposed, for example to protect the heritage of the site, or to allow ash interments or second interments in existing graves at the request of relatives. If the local authority considers the application should be subject to public notification or limited notification (for example, to the descendants of those buried), a resource consent hearing would provide an appropriate forum for public input into the ongoing management of these historic sites.
- 7.66 Alternatively, long-term land management issues could be considered when an open denominational burial ground applies for a closure order from the Environment Court under the new processes proposed below, pre-empting the need for these to be considered at point of sale. If a burial ground has been closed under the new processes, land use issues would be able to be considered, and conditions of the closure could bind future owners. This would mean the future sale of the burial ground could be unrestricted.

### Private land

- 7.67 We are of the preliminary view that current provisions for burial on private land are unnecessarily restrictive, and may not meet the needs and expectations of rural communities or remote settlements. On the other hand, given the ease of modern transport the current exception for burials on private land when the closest cemetery is more than 32 kilometres away may be seen as inappropriately lenient. We propose that the statutory restrictions prohibiting burial on private land should be removed.
- 7.68 Under this proposal, local authorities would become responsible for determining the circumstances in which private burials should be restricted through land use provisions under their district plans. Regional councils would also have a role in assessing the implications for soil and water quality. As with the current process under section 31 of the Burial and Cremation Act, it would be necessary for a person wanting to be buried on private land to obtain approval in advance. However, this approval would be in the form of a resource consent rather than Ministerial sign-off. Some national consistency may also be desirable, and could be achieved through the proposed National Environmental Standard. For example, this could provide that burial on private land is prohibited in urban areas.
- 7.69 If resource consent is granted for burial on private land, we propose it should be mandatory to record the location of the burial on the certificate of title and on the Land Information Memorandum; and to enter into a covenant for non-disturbance of the area of land used for burial, under section 108(2)(d) of the Resource Management Act. Burial on private land without resource consent would trigger the infringement provisions of the Resource

Management Act. In our view, this is a more appropriate response to unauthorised burials than imposing criminal sanctions,<sup>270</sup> and could include retrospective consenting where appropriate.

## MAINTENANCE AND LONG-TERM PROTECTION OF LAND USED FOR BURIAL

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- 7.70 As discussed in chapter 6, there are both public and private interests in ensuring individual graves and places of burial are adequately maintained and protected over the long-term. Ensuring that there is a robust and consistent statutory framework to achieve these objectives will be essential if our proposals to open the sector to new providers are accepted. The proposals below reflect our view mentioned above at [7.45] that legislation should focus on protection of the underlying land and clarifying standards of maintenance and service provision, rather than imposing restrictions on who may operate cemeteries.
- 7.71 In this section we outline the key elements of our proposals dealing with the establishment, management and protection of land used for human burials.

### Resource Management considerations

- 7.72 The burial of human remains raises land use issues, but at present these issues are poorly integrated into the general resource management framework. Despite the major reforms in New Zealand's local government and resource management law over the last 25 years, the Burial and Cremation Act has not been updated to reflect a modern approach to land management and the role of local government.
- 7.73 If the provision of cemeteries is opened up to alternative providers, it will be particularly important to ensure that resource management considerations are better taken into account. Under section 9 of the Resource Management Act, resource consent is required for a use of land that contravenes a rule in a district or regional plan or a national environmental standard. The implication of this section is that if the relevant plan does not restrict the use of land in question, and there is no national environmental standard, then the use of land will be permitted without resource consent.<sup>271</sup> Without a requirement for resource consent, the local authority would not be able to consider resource management issues (for example, the efficient use of land, and the effect that establishing a cemetery would have on the amenity of the area). The local community would not receive the opportunity to comment on the proposed use of land.<sup>272</sup>
- 7.74 As mentioned above, we consider that a National Environmental Standard could address a range of issues and provide some level of national consistency in managing the land use implications of cemeteries established by new providers. In particular, the National Environmental Standard could provide that all new cemeteries have a default non-complying activity status<sup>273</sup> if the relevant plan is silent.<sup>274</sup> A non-complying activity status is the most restrictive activity status available, and requires the applicant to demonstrate that the adverse effects of the activity on the environment are minor, and that the activity will not be contrary to the objectives and policies of a relevant plan or proposed plan.<sup>275</sup> Given the importance of addressing land management issues when a cemetery is established, we consider that this restrictive activity status might be appropriate where the activity is not otherwise controlled by

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270 Burial and Cremation Act, ss 46 and 54.

271 We note that under s 15 of the Resource Management Act 1991, if the activity involves a discharge of a contaminant to land resource consent will be required even if the relevant plan is silent.

272 It is our understanding that this scenario occurred when Auckland Memorial Park was established.

273 See s 87A of the Resource Management Act for an explanation of different classes of activities.

274 As mentioned above at [7.10], the National Environmental Standard could also direct local authorities to address the activity status of new cemeteries in their plans.

275 Resource Management Act, s 104D.

the relevant plan. This would not preclude local authorities from establishing a different activity status for new cemeteries after public consultation, as part of the process of developing a district or regional plan.

- 7.75 The National Environmental Standard would also address some matters that are currently covered in bylaws, including burial depth. The detail of the National Environmental Standard would be determined by the Ministry for the Environment in consultation with stakeholders. We also suggest that it could require public notification of all applications for resource consent to establish cemeteries, to ensure public involvement in the consenting process.<sup>276</sup>

### Protection of land used for burial

- 7.76 In principle we have argued that land used for human burial should be subject to special protections. Cemeteries and burial grounds fulfil a number of public and private functions. As well as being places where the deceased are memorialised, they are also repositories of our collective heritage. In chapter 6 we reached the preliminary conclusion that the law does not always adequately protect these interests, particularly in respect of the preservation of our historic burial grounds and cemeteries. However, we also recognise that disused historic cemeteries pose significant maintenance costs, especially if maintenance of monuments is taken into account. In some cemeteries, it is simply not financially viable for local authorities to keep all monuments in a state of good repair. When this happens, it may be preferable for the general amenity of the site for decaying monuments to be removed and the area planted over.
- 7.77 The current statute recognises this reality, but requires the assent of the Minister of Health before monuments may be removed. There is scope for current provisions to be improved. In developing the proposals below, we have sought to give better effect to the policy considerations that underpin the current statute, and to make better use of existing mechanisms for considering land use matters.

### *Closed cemeteries and closed former denominational burial grounds*

- 7.78 As with the current law, the statute will retain a distinction between open and closed cemeteries.<sup>277</sup> However, in accordance with our proposal new legislation would provide that the Environment Court, rather than the Minister of Health, would have the authority to close a cemetery.
- 7.79 Once burial capacity is exhausted or if burials are to discontinue for any other reason, cemetery managers would be able to apply to the Environment Court for an order closing the cemetery. Managers could alternatively apply for an order closing a section of a cemetery. A closed cemetery, or a closed section of an open cemetery, could continue to be used for the interment of ashes but not for the burial of bodies. Once a cemetery is closed, the cemetery manager would have to lodge the Environment Court order with the Registrar of Land, who would then record the status of “closed cemetery” on the certificate of title. Unlike the current processes, which rest on the discretion of officials, the details of this process would be set out in statute, including, for example the supporting information required and the timeframes for the decision.
- 7.80 We also propose that the Environment Court should be able to authorise the clearance of monuments from closed cemeteries (currently this power also rests with the Minister of Health). Cemetery managers would be able to apply for an order allowing clearance when applying to close a cemetery, or at any time after a cemetery is closed. The Environment

<sup>276</sup> Under s 43A(7)(a) of the Resource Management Act, a National Environmental Standard may specify activities for which the consent authority must give public notification.

<sup>277</sup> For the sake of brevity, in the discussion under this heading we use the term “cemetery” to include denominational burial grounds.

Court could then grant the authority for clearance subject to conditions, including conditions mirroring those contained in section 45(2A) to 45(3) of the current Act. Where monuments pre-date 1900, the Historic Places Trust would also need to be notified of an application for clearance. Necessary archaeological consents would also be required, as well as the permission of plot holders where relevant. Best attempts would also need to be made to notify relatives, who should have the opportunity to submit.

- 7.81 Cemetery managers could continue to remove unsafe monuments at any time without the permission of the Court, provided records were kept of the precise burial location of individuals and all reasonable efforts were made to notify the family of the deceased.
- 7.82 The current law requires the permission of the Minister of Health for the alternative use of burial grounds, and an empowering statute for the alternative use of cemeteries. There are no criteria to be taken into account. There is a potential conflict of interest in these provisions, and no requirement for independent assessment of clearance for public works favoured by central government. It is our view that this process should instead be open and transparent, and provide for public submissions and independent decision making. We therefore suggest that applications to change the use of a cemetery should be lodged with the Environmental Protection Authority and referred either to the Environment Court or a Board of Inquiry. New legislation would introduce a modified process under sections 145 to 147 of the Resource Management Act to achieve this.
- 7.83 The Environment Court or the Board would proceed to assess the application as if the proposed activity had a discretionary status and had been publicly notified. In addition to the usual considerations under the Resource Management Act,<sup>278</sup> the Environment Court would be required to have particular regard to the importance of cemeteries for the social and cultural well-being of communities. If the application is granted, the Environment Court could impose conditions relating to the disinterment of remains, the removal of any monuments, and the re-interment of remains or re-erection of monuments elsewhere. If the proposal included the disinterment of human remains, the applicant would have to prepare a report by an environmental health protection officer and environmental health issues would have to be considered by the Environment Court.

#### *Further protections*

- 7.84 In addition to statutory provisions, individual councils could establish additional protections through district or regional plans. Independent cemetery managers could also enter into covenants for future maintenance, or fetter the ability of themselves and future landowners to use the land for alternative purposes, for example, through trust ownership structures.
- 7.85 We consider that statutory restrictions on alienation of local authority-owned cemeteries should remain. Under the recommendations above, local authorities would be able to devolve cemetery managements to community groups. Management could also be contracted out under the general provisions of the Local Government Act 2002. However, it is our view that allowing local authorities to sell cemeteries is inconsistent with their long-term role in providing this public service.

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<sup>278</sup> See ss 5, 6, 7, 8 and 104. Under the framework established in the Resource Management Act, an application for a resource consent will be granted or declined based on the balance of effects, taking into account both the adverse effects and the positive effects and the degree to which adverse effects can be mitigated.

## Maintenance of individual graves

- 7.86 Most local authorities and other cemetery and burial ground managers appear to be of the view that the responsibility to maintain a monument rests with the person who has erected the monument, usually the estate of the deceased or their relatives or friends.
- 7.87 Unsurprisingly, this creates a problem for maintenance. In short, by the time a monument reaches the point of requiring maintenance, those close to the deceased are likely to have died themselves and it will not always be clear where the responsibility for maintenance lies. Local authorities could charge an additional fee at the outset to provide for ongoing monument maintenance, but this is not a universally adopted practice. Instead, it appears that most local authorities leave monuments unmaintained and undisturbed until they pose a danger. At this point, they are required to make the monument safe or remove it under section 9(h) of the Burial and Cremation Act.
- 7.88 There are significant heritage implications of the current failure to adequately maintain monuments. There is also conflict between the requirement to remove dangerous memorials under the Act, and the requirement under the Historic Places Act to leave archaeological sites undisturbed unless an authorisation is granted. A lack of maintenance is also detrimental to the general amenity of these public spaces.
- 7.89 We consider that for new graves, these issues should be addressed in the contract for the sale of a burial plot. However, the statute should contain clear default rights and responsibilities for existing graves. Local authorities have responsibility for general maintenance of their cemeteries, and this should include considering the heritage and amenity values of monuments and undertaking appropriate work to protect and enhance those values. This should be a flexible requirement, given the different priorities in different areas of the country. Local authorities are best positioned to determine the appropriate level of maintenance for their cemeteries, taking into account community views and the cost/benefit analysis for their districts. This approach views local authority cemeteries as primarily public places, with maintenance required to enhance the overall public space and maintain community heritage rather than out of respect to the individual deceased. It is intended that this role for the local authority would not preclude individuals undertaking maintenance of particular graves or paying for their restoration, provided they have the appropriate authority to do so.
- 7.90 We also note that it would be costly to require an authorisation from the Historic Places Trust for all maintenance work on pre-1900 headstones. It may be preferable to provide an exception to this provision of the Historic Places Act, and instead require that local authorities consult with the Historic Place Trust when determining how best to protect heritage within public cemeteries. Similar issues arise for removing unsafe pre-1900 monuments. We invite submissions on whether the local authority power to remove unsafe monuments should override heritage protection provisions in the Historic Places Act.
- 7.91 We consider that it may be too onerous to require cemetery trustees to maintain historic monuments, especially given that for many community cemeteries the majority of graves will be of historical significance, and the yearly revenue is often barely sufficient to cover grounds maintenance. It may be more appropriate to require local authorities to consider the heritage value of graves within trustee-managed cemeteries in their districts, with a view to providing grants for memorial maintenance, if this is considered justified by heritage protection values.
- 7.92 For new graves, local authorities and managers of independent cemeteries should be able to charge an upfront payment for monument maintenance, depending on the type of memorialisation. Families who do not wish to pay this additional charge could choose a low-

maintenance option or could choose to retain responsibility to maintain the monument, subject to the reserved right of the local authority to remove it in future if it becomes a hazard, or after a certain period of time.

## OTHER ISSUES

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7.93 A number of miscellaneous issues have arisen in our consultation. These are addressed below.

### Contract for sale of a plot

7.94 As indicated above in chapter 4, contracts for the sale of a plot often fail to clarify important matters affecting the respective rights and responsibilities of cemetery managers and plot holders. We consider that new legislation should include a set of “default provisions” for plot holder contracts,<sup>279</sup> and that these provisions should be supplemented by a model contract prepared by an appropriate agency and distributed to local authorities. We invite submissions on what these default provisions should address. At this stage, we think that the following should be included as a minimum.

- The purchase of a plot confers the right to perpetual undisturbed interment.
- In a double-depth plot, the spouse of the deceased has the right to the second burial.
- The heirs of the deceased have the responsibility to maintain monuments, unless a maintenance fee has been paid to cemetery management.
- The heirs of the deceased have the right to consent to additional interments, including the interment of ashes.

7.95 The default provisions above could be altered by contract, and the model contract could include options other than the default provisions for selection by the purchaser. For example, the model contract could provide as follows in relation to a double-depth plot:

Select one of the following.

*Indicate your selection by striking out the options that do not apply.*

- The spouse of the deceased [insert name: \_\_\_\_\_] has the right to the second interment.
- The following named person [insert name: \_\_\_\_\_] has the right to the second interment.
- The children and grandchildren of the deceased have equal rights to the second interment, priority being given based on order of death.
- The following named persons [insert names: \_\_\_\_\_] have equal rights to the second interment, priority being given based on order of death.

7.96 Additional detail could also be contained in the model contract for plot purchase, for example, providing detail on the monuments permitted, the decoration of graves, the long-term maintenance of memorials after the heirs have themselves passed away, and the alteration of memorials.

### Multiple burials in a plot

7.97 Space pressures are not yet a significant concern in New Zealand. However, the cost of burial and the maintenance costs of cemeteries are both matters of current public interest. As our population continues to expand, particularly in urban centres, we may find ourselves facing

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<sup>279</sup> A default provision in legislation will apply unless modified. Examples exist in many areas of law, including residential tenancy law and company law. This provides for a clear legal position if the relevant contracts or other legal instruments are silent, but would not prevent individuals from making alternative arrangements.

a shortage of burial space or prohibitive plot prices in the future. In many other countries, multiple burials in a plot are used to increase the capacity of cemeteries and reduce plot prices. In jurisdictions that have adopted this approach, cemeteries are generally fully self-funding and often profitable.<sup>280</sup>

- 7.98 Multiple burials within individual plots were historically common in areas of longstanding human settlement, including throughout Europe. Further burials generally took place only after the previous corpse had completely decomposed, so that no exhumation was necessary. Any bones inadvertently exposed were returned to the bottom of the grave, covered with a thin layer of soil, and then a new coffin placed on top. In this way burial grounds remain as burial grounds indefinitely, without running out of space. In the United Kingdom this was common practice until the early 1800s, when concerns about graves being prematurely uncovered prompted a shift to the idea of perpetual and undisturbed interment.
- 7.99 There are currently no explicit restrictions on the multiple use of graves, except insofar as disinterment is controlled. Some forms of multiple burials are already common in New Zealand, such as the stacking of graves within a family plot. But it is not common practice to bury more than two bodies in a single plot.
- 7.100 In contrast, many European jurisdictions allow the reuse of gravesites after 50 years, meaning that a steady income stream from plot sales is ongoing and cemeteries can remain self-funding in the long term. In some jurisdictions, including within some Australian states, a burial plot may be leased for 50 years with a right of renewal. If the lease is not renewed by the family of the deceased, any remains will be exhumed and reburied deeper within the same plot, and the grave space reused for a second burial. Combining stacked graves with exhumation and reburial of remains at a lower depth would allow for the burial of between three and seven bodies in a plot. This may appeal to some people as a way of providing for a greater number of family members to be buried together.
- 7.101 As we are of the view that there is no compelling public policy reason to legally restrict this option for multiple burials (and indeed, some policy reasons to recommend it), we raise it as a question for debate and consideration. However, we also anticipate that public acceptance may not currently be strong, although it may develop over time. Whether rights to a burial plot are sold as perpetual interment, or a 50-year lease, or some other option, can be left to the contract for sale of a plot. Reflecting long-standing New Zealand practice, we suggest that the default position should be perpetual interment. Any alternative arrangement must be clearly explained to the person purchasing the plot and the agreement recorded in writing.

### Scope of bylaws

- 7.102 The Act grants local authorities very broad powers to make bylaws. Provisions in the Local Government Act 2002 also empower local authorities to make bylaws for cemeteries.
- 7.103 As mentioned above, bylaws are the main tool with which local authorities manage cemeteries under their control. Bylaws therefore have significant implications for the rights in respect of a plot. This can be problematic if the bylaws change after the date of plot purchase in a way that adversely affects plot-holder rights. More generally, there is significant duplication of effort and resources with different local authorities separately preparing bylaws, often out of a concern that the statute contains insufficient detail.

280 See Centennial Park “Burial Information” (Adelaide, December 2011) < [www.centennialpark.org](http://www.centennialpark.org) >; Cheltenham Cemetery “Terms and Conditions relating to Grants of Interment Rights” (Adelaide) < [www.aca.sa.gov.au](http://www.aca.sa.gov.au) >.

7.104 We consider that the bylaw-making powers should be more tightly confined, and that some matters currently regulated in bylaws should instead be controlled by the statute or other regulation, to avoid the risk of duplication and to promote clarity. We are interested in hearing the views of local government as to the appropriate scope of the bylaw-making powers, and areas that should more properly be regulated consistently throughout the country or determined through the contract for plot sale.

### Reform of information provisions

7.105 A number of the reforms mentioned above have implications for the collection and retention of information about places of burial. For example, the proposal in this chapter for the management of cemeteries to be governed by a Resource Management Act framework will invoke the information provisions of this Act, such as section 35.<sup>281</sup>

7.106 For burials on private rural land, we propose that the location of the burial be recorded on the certificate of title and the Land Information Memorandum. In addition, if local authorities are to maintain a burial register for their district, including independent as well as community and local authority cemeteries, there would be an option to include private burials in the register, with the resource consent applicant being required to notify the local authority of the burial within a specified time period.

## CONCLUSION

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7.107 In chapters 5 and 6, we considered the two major sets of policy issues that during our analysis and preliminary consultation:

- the responsiveness of the current legal framework to the range of individual and community needs with respect to burial; and
- the adequacy of the legal framework for ensuring the sustainable long-term management and preservation of land used for human burial.

7.108 The challenge is providing a framework for the provision and management of cemeteries that creates clear responsibilities, yet is flexible enough to respond to the different community needs of a diverse country, both now and in the future. The options presented above seek to achieve the appropriate combination of community responsiveness and robust management structures. We invite public submissions on all elements of these proposals, and in particular, the areas identified in questions below.

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<sup>281</sup> Section 35 of the Resource Management Act requires a local authority to gather such information as is necessary to carry out effectively its functions under the Resource Management Act, and to make such information reasonably available including records of applications for resource consents, records of resource consents granted, and a summary of complaints about breaches of the Resource Management Act.

## CONSULTATION QUESTIONS

- Q1 Would you support opening the provision of cemeteries up to independent providers, such as those providing cemeteries for “eco” or “natural burials”, complementing the public cemeteries provided by local authorities?
- Q2 If so, do you think those establishing independent cemeteries should be limited to registered charities? Should independent cemeteries be allowed to make a profit?
- Q3 Should it be lawful for someone to be buried on private land, provided the necessary consents have been obtained?
- Q4 Where practically possible, should local authorities be required to provide separate burial areas within public cemeteries for groups with specific religious or cultural burial requirements?
- Q5 Do you think the law should establish minimum standards for the maintenance of cemeteries?
- Q6 Do you think there should be stronger legal provisions for the protection of historic cemeteries and grave sites?

7.109 In addition to these high-level questions, we also pose the following questions for more detailed consideration by those who are interested:

- (a) Do you agree that denominational burial grounds should be transitioned to the framework for independent cemeteries?
- (b) Do you agree that the management of community cemeteries should be overseen by local authorities rather than by central government, including giving them the power to appoint trustees?
- (c) Do you agree that the underlying title of community cemeteries should be vested in either the local authority or the registered charitable trust appointed to manage the cemetery?
- (d) Do you agree that the Environment Court, rather than the Minister of Health, should be able to approve the closure of cemeteries or burial grounds or a change in use of the land?
- (e) Should the local authority power to remove unsafe monuments within public cemeteries override heritage protection provisions in the Historic Places Act?
- (f) What matters should be included as statutory default provisions for the sale of a burial plot?
- (g) What matters should be addressed in a model contract for sale of a plot?
- (h) At this point we are not proposing additional measures to address the desecration of graves. In your view are the current provisions adequate?
- (i) What information and record-keeping obligations do you consider should apply to cemetery managers?

# Chapter 8

## Cremation: sector overview and policy issues

### INTRODUCTION

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- 8.1 In New Zealand cremation is the most common method used for final disposition of a body.<sup>282</sup> An Auckland funeral director believes that cremation “fits with the no frills mentality of Kiwis”.<sup>283</sup> There are no national cremation statistics but an estimated 70 per cent of deceased New Zealanders are cremated each year.<sup>284</sup> One Hamilton funeral director has reported that eight out of 10 funerals are cremations, with cost being a major factor in people’s decisions,<sup>285</sup> while another believes that cremation rates have dropped from about 80 per cent a few years ago to around 70 per cent, with more people now opting for natural burials.<sup>286</sup>
- 8.2 In this chapter we give a brief overview of the cremation sector, describe how it is currently regulated and raise potential policy issues. In the next chapter we consider features of regulatory models used overseas, and set out some preliminary reform options on which we seek feedback.
- 8.3 In chapter 7 we reached fairly firm reform proposals for the cemetery sector, after extensive preliminary consultation and feedback through the Local Authority and Cemetery Trustees Surveys, and preliminary discussions with government agencies and stakeholders. However, by comparison, our reform proposals for the cremation framework are not as fully developed as we have not yet had sufficient engagement with key stakeholders or the public to confirm our preliminary conclusions. The sector, as we describe below, is made up of a mix of providers, with the Cemeteries and Crematoria Collective being recently established to represent and advise on industry interests and matters.<sup>287</sup> We look forward to further discussion and engagement with the Collective, the industry and the public in identifying and responding to current issues.

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282 For historical background see chapter 3 at [3.24]–[3.28].

283 Scott Morgan “More cemetery sites planned” *Western Leader* (online ed, Auckland, 10 March 2011). See also Shelley Bridgeman “Burial, cremation and organ donation” *The New Zealand Herald* (online ed, Auckland, 1 November 2012); Sarah Harvey “Funeral fireworks ... why Kiwis go out with a bang” (6 May 2012) Stuff <stuff.co.nz>; Nicholas Jones “Cremation popular as religion’s role declines” *The New Zealand Herald* (online ed, Auckland, 5 January 2012).

284 Rates vary significantly from region to region and within different demographic groups. See Law Commission *Final Words: Death and Cremation Certification in New Zealand* (NZLC IP23, 2011) at [3.1]. See also Leila Chrystall and Andrew Rumsby *Mercury Inventory for New Zealand 2008* (Pattle Delamore Partners Limited, 2009) Section II at 3.2.10, estimating that approximately 17,500 corpses were cremated in New Zealand in 2008, based on the official deaths registered in that year and an estimated ratio of cremations to burial of 60/40; Dr Bruce W Graham and Dr Alistair G Bingham *New Zealand Inventory of Dioxin Emissions to Air, Land and Water, and Reservoir Sources* (Ministry for the Environment, 2011) at 35, assuming a cremation rate of 61.4 per cent for the purposes of emissions estimates for 2013 and 2018, based on average cremation rates.

285 Aaron Leaman “Illegal burials on the rise in Waikato” *Waikato Times* (online ed, 8 August 2012).

286 Michelle Cooke “Natural burials the way to go” (20 April 2012) Stuff <stuff.co.nz>.

287 The Cemeteries and Crematoria Collective has been established under the umbrella of the New Zealand Recreation Association (NZRA), an organisation for recreation professionals, following the NZRA Cemeteries and Crematoria Collective Conference in June 2012. The Collective’s terms of reference are available at <www.nzrecreation.org.nz/professional-services>. The Collective’s vision is “to become the lead support and advisory group in the NZ Cemeteries and Crematoria sector” and its purposes are “to lead the sector in delivering the best outcomes to the community and individuals touched by bereavement”, and “to encourage a collective approach to sharing information, knowledge, expertise and professional development in the cemeteries and crematorium sector”: New Zealand Cemeteries and Crematoria Collective “Terms of Reference” (2013).

- 8.4 Crematoria are regulated through a combination of primary, secondary and tertiary legislation. In this chapter, we ask whether that regulatory framework is fit for purpose. We have focused specifically on the following interests and drivers:
- the dual public and personal interests in ensuring the remains of the deceased are treated with dignity and respect, both during and after the cremation process;
  - the public interest in maintaining law and order and the need to minimise the risk of the premature destruction of evidence of criminal wrongdoing;
  - the interests of the community regarding the siting of crematoria; and
  - consumer interests in having reasonable access to local cremation services.
- 8.5 As highlighted throughout this paper, dignity and respect for the deceased and the bereaved family is a key policy driver. One of the regulatory goals therefore is to ensure that regulatory and compliance standards provide the necessary degree of public assurance.
- 8.6 As well as dignity and respect, some of the policy drivers that we discussed in relation to the cemetery sector in previous chapters also arise in the context of cremation, such as responsiveness to community and cultural demands throughout the process, and environmental sustainability.
- 8.7 The cremation industry also shares some of the policy drivers that operate in the funeral services sector (discussed in Part 2), such as safe and sanitary practices in the handling of the deceased. The provision of crematoria is not restricted to local authorities or public bodies and the majority of the sector is now made up of private providers. This is a feature that distinguishes the cremation sector from the current make-up of the cemetery sector, where public provision is dominant by virtue of the legislative framework.
- 8.8 The cremation and funeral services sectors are becoming increasingly connected because of a trend towards vertical integration. As we discuss below, a significant number of new cremators have been installed in New Zealand over the past five years in conjunction with existing funeral homes.
- 8.9 The sector also has its own unique policy drivers to consider. As the cremation process transforms human remains into ash, with the consequent destruction of DNA and other evidence relevant to the cause of death, regulatory safeguards need to minimise the risk that cremation prematurely destroys evidence of any criminal wrongdoing that may have contributed to the death. Some of these aspects of the regulatory framework have been covered in an earlier Issues Paper.<sup>288</sup>

## OVERVIEW OF THE SECTOR

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### The cremation process

- 8.10 The body, generally in a casket, is placed in the crematory furnace and exposed to extreme heat.<sup>289</sup> During cremation, the soft tissue and most of the skeleton is reduced to ash. Some small bone fragments, known as cremains, also remain. Magnets are passed over the remains to attract any fragments of metal from artificial limbs or joints or from the casket used in the cremation.<sup>290</sup>

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288 *Final Words: Death and Cremation Certification in New Zealand*, above n 284.

289 Sometimes the body may be wrapped in a shroud, although some crematoria only accept bodies in caskets for cremation.

290 See Anna Pearson “Recycle bid for implants of cremated Titanium parts buried” *Nelson Mail* (online ed, 18 May 2012); Anthony Walton “Metal body parts don’t make the cut” *Taranaki Daily News* (online ed, 5 August 2010).

- 8.11 It is common practice in New Zealand to then grind the remains in a cremulator to give the uniform, sand-like consistency of the ashes, which can then be given to family members in an urn or other container. Some cultures, however, prefer that the cremains be left undisturbed, as the bone fragments are considered to have particular significance.

### Other methods of disposition

- 8.12 Around the globe, concerns about emissions and the high amount of energy required to cremate a body have led to the development of a number of experimental technologies for disposal of the body. One example is resomation, which uses alkaline hydrolysis to liquefy the body.<sup>291</sup> Although not yet introduced in this country, some local authority crematoria are monitoring this and other new technologies. It seems likely that in future decades, alternative technologies for the disposition of human remains could well be introduced. While the focus of this chapter is on the regulatory environment surrounding cremation, the principles and policy issues under consideration would almost certainly be applicable to any new disposition techniques for the treatment of human remains adopted in New Zealand.

### The mix of public and private providers

- 8.13 New Zealand does not have a central register of crematoria; however, the Ministry of Health has compiled information, with help from the Funeral Directors Association of New Zealand, to provide data for this review.<sup>292</sup> This information shows that there are 52 crematoria in operation, 15 of which are operated by local authorities,<sup>293</sup> with the remainder being run by private providers. Some private providers operate as a standalone business supplying cremation services to the funeral services sector. Others operate within funeral homes and offer a full suite of services to the bereaved.
- 8.14 The data shows considerable variation in the number, size and mix of public and private providers operating in different parts of the country. In some urban areas, including Dunedin and Invercargill, local authorities are the sole providers of cremation services, while in Canterbury cremation services are provided solely by the private sector.<sup>294</sup> Other centres such as Wellington and Auckland contain a mix of local authority-owned and private crematoria. In other areas, a small number of local authorities have entered into partnerships or leasing arrangements with private operators, offering cremation services within or adjacent to the local authority cemetery.<sup>295</sup>
- 8.15 In Auckland, the majority of cremations are carried out at one of three crematoria operated by the Auckland Council (Manukau Memorial Gardens, North Shore Memorial Park and Waikumete Cemetery). There are also various private crematoria, some of which are run by trustee-managed cemeteries (such as Mangere Lawn Cemetery and Crematorium) or church trust boards (such as Purewa Cemetery and Crematorium). A private provider has approval to establish a crematorium on the site of the Buddhist denominational burial ground in Silverdale.

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291 See Nina Chestney “Cryomation lessens burial footprint” *Reuters* (online ed, 14 September 2012); “Water cremation centre opens in Australia” *Australian Associated Press* (online ed, 12 August 2008).

292 The information compiled includes the name of the crematorium authority, trading name, name of the manager, a site and service description (for example, whether a standalone crematorium or located in a funeral home), the approximate number of cremations per year, and the names of the medical and deputy medical referees responsible for approving cremations at the facility.

293 North Shore Memorial Park (Auckland), Waikumete Cemetery and Crematorium (Auckland), Manukau Memorial Gardens Cemetery and Crematorium, Hamilton Park Crematorium, Tauranga Crematorium, Hillcrest Crematorium (Whakatane), Taranaki Crematorium, Hastings Crematorium, Aramoho Cemetery (Wanganui), Kelvin Grove (Palmerston North), Whenua Tapu (Porirua), Wellington, Nelson Crematorium, Dunedin Crematorium, and Southland Crematorium.

294 The largest provider, the Cremation Society of Canterbury, operates two of the four facilities servicing the urban population and offers chapel facilities and ash interment in memorial gardens. Another is owned by one of the city’s larger funeral firms. The more recently established Mainland Crematorium provides a facility for the funeral industry to cremate eco-coffins imported by the owner.

295 For example in Carterton, Upper Hutt and Whangarei.

- 8.16 Not surprisingly, the number and location of cremation services tends to reflect population density, with larger population centres well catered for, while those living in more sparsely populated areas often have to travel considerable distances to a crematorium. On the West Coast of the South Island, for example, there is only one crematorium, based in Greymouth.
- 8.17 The cremation of pets is growing in popularity, with services provided by the SPCA and specialist pet cremation businesses, as well as services offered by some regular cremation businesses.<sup>296</sup> However, our focus in this Issues Paper is human cremation services, as animals-only cremation services do not fall within our terms of reference.<sup>297</sup>

### Industry trends

- 8.18 The industry is going through a number of technological, environmental and commercial changes that are likely to have significant impact on its future make-up and structure.
- 8.19 The profitability of running a crematorium is determined by a mix of factors including the cost of capital, operating costs, the efficiency and capacity of the cremator, the number of cremations carried out and revenue generated from fees and additional services. Barriers to entry are falling with the manufacture of smaller cremators which can be constructed relatively cheaply and installed with minimal investment in buildings. Modern cremators are increasingly sophisticated and designed to meet emissions standards and cater for the needs of different sized operators, including funeral homes that wish to have a small cremator on-site.<sup>298</sup>
- 8.20 This technology provides the funeral services sector with the opportunity to install crematoria so that funeral services providers can offer a full range of funeral and cremation services. Our analysis of the market shows that New Zealand is following a global trend towards vertical integration<sup>299</sup> and, according to information provided to us by the Ministry of Health, a significant proportion of new cremators installed over the last 10 years were opened in conjunction with funeral homes.
- 8.21 At the same time, older and less efficient crematoria face the prospect of significant investment to upgrade or replace their cremators, if they are to renew existing resource consents.<sup>300</sup> For local authorities confronted with this issue, the strength of private sector competition is a critical consideration.<sup>301</sup> Our Local Authority Survey suggests that in situations where the local authority has been losing market share to private providers, it may be that they will either exit the market or will look to form a partnership arrangement with a private provider.
- 8.22 As noted above, the Cemeteries and Crematoria Collective was recently established under the auspices of Recreation New Zealand to represent the interests of the cemeteries and crematoria industry in New Zealand.<sup>302</sup>

296 A report for the Ministry for the Environment identified 13 pet incinerators throughout the country: Graham and Bingham, above n 284, at [7.1.3]. See also Kate Monahan “The heart-wrenching” *Waikato Times* (11 July 2008); Lois Watson “\$1000 cremations the perfect pet send-off” *Fairfax Media* (online ed, New Zealand, 22 March 2009); Tom Hunt “Owner neglects ashes in ‘insult’ to pets” *The Dominion Post* (online ed, Wellington, 23 February 2011); Natasha Van der Laan “Big demand for pet cremations” *Taranaki Daily News* (online ed, 6 August 2012).

297 See Tracy Neal “Plan considers ageing population” *Nelson Mail* (online ed, 26 September 2012) reporting that pet cremations at Nelson’s Wakapuaka Cemetery are handled in a separate burner to that used for human cremations.

298 Our research indicates low to medium volume cremators (four to six cremations per day) may be purchased for between \$250,000 and \$300,000.

299 See further discussion in ch 10 at [10.12]–[10.13].

300 One factor in upgrading facilities is installing bigger furnaces that have capacity for larger coffins: see Marty Sharpe “A burning issue: when coffins get too big” *The Dominion Post* (online ed, Wellington, 11 February 2012); Ian Allen “Caskets to fit growing dimensions” *The Marlborough Express* (online ed, 15 February 2012).

301 See Janine Rankin “Falling number of burials forces fee hikes” *Manawatu Standard* (online ed, 27 April 2013), noting that competitive pressures mean that council charges for burials and cremations may not cover actual costs. See also Matt Rilko “Council caps cremation prices – private operation forces decision on pricing” *Taranaki Daily News* (online ed, 27 April 2009); Ryan Evans “Appeal over rise in crematorium fees” *Taranaki Daily News* (online ed, 3 June 2010) “Crematorium gets extra help” *Taranaki Daily News* (online ed, 11 June 2010); John Cousins “Burial costs set to rise in Tauranga” *Bay of Plenty Times* (online ed, 29 January 2012).

302 See above n 287.

## THE REGULATORY FRAMEWORK

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- 8.23 The regulatory framework for crematoria operates at both national and local level:
- The Burial and Cremation Act 1964 includes provisions about the establishment, regulation and self-regulating powers of crematoria, death certification provisions and offences concerning cremation. The Crimes Act 1961 also includes an offence of misconduct in respect of human remains.
  - The Health Act 1956 empowers the Minister of Health to require local authorities to provide crematoria in their districts.
  - The Cremation Regulations 1973 set out operational matters concerning how crematoria are run on a day-to-day basis, and crematorium bylaws or rules may also deal with this.
  - The Resource Management Act 1991 and the consenting process also regulate the siting, construction and operation of crematoria, including emissions.
- 8.24 In comparison to other jurisdictions, New Zealand's regulatory environment is relatively light. There are no licensing or training requirements for crematorium operators or employees. The operational detail and standards provided in the Cremation Regulations is also basic. This means actual practices and procedures adopted by each crematorium may vary. This in itself is not necessarily problematic, but the issue, in our view, is whether the current framework provides the necessary level of public assurance that crematoria and their operators are meeting adequate minimum standards.
- 8.25 The cremation process generally takes place out of sight both of the public and the family of the deceased.<sup>303</sup> The body is handed over to the crematorium operator and the disposition process usually occurs in a closed setting. This means that any regulatory oversights that might occur during the process are largely hidden from view and it may be difficult for regulatory authorities to obtain accurate or forthright information about them.
- 8.26 A second feature of note is that some aspects of the existing framework were developed at a time when cremation services were largely provided by public bodies. Therefore, these features are not designed for the current make-up of the sector given that the private sector now has greater overall market share.
- 8.27 Our preliminary assessment is that the age of the regulatory framework, the level of change in the sector, and the range of policy issues discussed further below suggest that it would be desirable to update and strengthen the framework.

### Burial and Cremation Act 1964

- 8.28 Four aspects of the Act relate directly to cremation: definitions in section 2 (that trigger the application of the regulatory framework), Part 5, aspects of Part 7 relating to death certification, and offences in section 56.

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<sup>303</sup> The closed nature of the cremation was said to be a factor in last year's "home cremation" case where a family wished to be present for the cremation but were denied access for health and safety reasons: "Cremation sparked by access denial" *The Southland Times* (online ed, 5 April 2012); "Body taken after family denied entry" *The Press* (online ed, Christchurch, 6 April 2012). However, some crematoria have viewing windows where the family can see the entry of the casket into the cremator; closed circuit cameras which video every entry into the cremator; or hold "open days" where the public are invited "behind the scenes": see Francesca Lee "So, this is how it all ends?" *The Press* (Christchurch, 18 May 2013); Matt Rilko "Living line up for tour of region's hottest spot" *Taranaki Daily News* (online ed, 25 January 2012); Fairfax NZ News "Crematorium opens doors" (12 September 2007).

### Definitions

8.29 A crematorium is defined in the Act as “appliances and machinery and furnaces for effecting cremation”, and includes any building in which such appliances, machinery or furnaces are fixed.<sup>304</sup> Any person who has control and management of a crematorium, whether a local authority or a private operator, is defined as a “crematorium authority”<sup>305</sup> and is subject to the regulatory regime.

### Part 5

8.30 Part 5 of the Act deals with requirements for establishing crematoria. Section 38 enables crematoria to be opened and operated by a local authority, either within or outside of the grounds of a cemetery. The provision also anticipates the establishment of crematoria by others besides local authorities. In either case a proposal to construct a crematorium must be submitted for approval by the Minister of Health.<sup>306</sup> In practice applications are made in the first instance to a health protection officer or local medical officer of health, who then provides a report on technical matters and a recommendation to the Ministry of Health Public Health team.

8.31 Approval is made by the Public Health team on delegated authority from the Minister of Health, and involves an examination of resource consents and an assessment of the specifications and plans of the crematorium against applicable guidelines.<sup>307</sup> A second approval to commence operation is required under the Cremation Regulations, discussed below.

8.32 A second key provision is section 40, which confers a bylaw-making power on every local authority “with respect to any crematorium under its control”, and sets out the purposes for which crematorium bylaws may be made. This power is extended to any person owning or controlling a crematorium, provided any bylaws are first approved by the Minister.<sup>308</sup>

### Death certification

8.33 Other key provisions relating to cremation are the pre-cremation death certification provisions in Part 7. The Act sets out a process for ensuring that, before a body is buried or cremated, any deaths that occurred in sudden, unnatural or violent circumstances are referred to the coroner for investigation.<sup>309</sup> The issues surrounding death certification were canvassed in an earlier Issues Paper.<sup>310</sup>

### Offences

8.34 Section 56 of the Act provides for the following offences:

- burning a body other than in accordance with the Cremation Regulations (maximum penalty of 500 pounds or imprisonment for a term of 12 months);

304 Burial and Cremation Act 1964, s 2.

305 Cremation Regulations 1973, reg 2.

306 Burial and Cremation Act, s 38(2).

307 For example *Australian/New Zealand Standard: Management of clinical and related wastes*. AS/NZS 3816:1998. According to guidelines available from the Ministry of Health, *Guidelines for Establishing New Crematoria* (2004), applicants are required to provide information relating to the company and/or names and addresses of the persons who will own and operate the crematorium, along with evidence of their suitability, details of any proposed crematorium bylaws, the names and addresses of the persons who are to act as medical referee, registrar and attendant, details of test firing procedures and a report on any test undertaken. See also Ministry of Health *Guidelines on the Siting and Construction of Crematoria* (1992).

308 Burial and Cremation Act, s 40(2). We understand that few if any private providers have utilised this provision; rather, the focus is on the operating constraints of resource consent conditions.

309 Sections 46AA-46C.

310 *Final Words: Death and Cremation Certification in New Zealand*, above n 284.

- breaching the Cremation Regulations (maximum penalty of 500 pounds or imprisonment for a term of 12 months);
- giving a false certificate to procure cremation (maximum penalty of imprisonment for a term of two years); and
- procuring a cremation or giving a certificate with intent to conceal the commission of an offence or impede the prosecution of an offence (maximum penalty imprisonment for a term of five years).

8.35 The Crimes Act offence of misconduct in respect of human remains is also part of the overall regulatory framework that applies to the provision of cremation services:<sup>311</sup>

Everyone is liable to imprisonment for a term not exceeding 2 years who—

- neglects to perform any duty imposed on him by law or undertaken by him with reference to the burial or cremation of any dead human body or human remains; or
- improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not.

8.36 In *R v Mills*, “indignity” was said to require “unworthy, contemptuous or insolent” conduct.<sup>312</sup> In *R v Young*, the High Court held that to place a child’s body in a casket containing the body of someone unrelated to the child, for the purposes of cremating it, is to offer an indignity to the dead body of the child; and to bury or cremate a body with the bodily organs not replaced, or to include in a burial casket the bodily organs of another person, is likewise to offer indignity within the meaning of section 150(b) of the Crimes Act.<sup>313</sup>

### Health Act 1956

8.37 Crematoria are included in the definition of “sanitary works” in section 25(1) of the Health Act. This section empowers the Minister of Health to require any local authority to provide, alter or extend any sanitary works such as crematoria, or require any two or more local authorities to combine to provide, alter or extend any such sanitary works.<sup>314</sup>

### Cremation Regulations 1973

8.38 The Regulations contain much of the substance of the regulatory framework applying to crematoria. The Regulations were first introduced in 1928 and have been amended only in superficial ways since coming into force. They contain establishment and operational processes and requirements, including:

- the application process, the forms that must be filled out and the records that must be kept for each individual cremation;<sup>315</sup>

311 Crimes Act 1961, s 150.

312 *R v Mills* (1992) 77 CCC(3d) 318 (CA); J Bruce Robertson (ed) *Adams on Criminal Law – Offences and Defences* (online looseleaf ed, Brookers) at CA 150.02.

313 *R v Young* (1984) 1 CRNZ 568; Robertson, above n 312, at CA 150.02.

314 We understand from the Ministry of Health that this power has not been used in the last 25 years, if ever.

315 Cremation Regulations 1973, regs 5 and 9, sch 1 (Form A).

- (b) the processes that must be gone through before a body can be cremated, including completion of an additional medical certificate,<sup>316</sup> and completion of the Permission to Cremate form by the medical referee;<sup>317</sup>
  - (c) providing for the duties of the crematorium attendant and registrar:<sup>318</sup>
    - the attendant’s role is to check that the identity of the person to be cremated matches the person referred to in the Permission to Cremate form prepared by the medical referee;<sup>319</sup>
    - the registrar’s role is to keep a register of information relating to all cremations that have been carried out, containing the information set out in the scheduled form,<sup>320</sup> and all related “applications, certificates, statutory declarations, and other documents” which must be marked with a corresponding number and retained by the crematorium;<sup>321</sup>
  - (d) requiring that the crematorium be maintained “in good working order and in a clean and orderly condition”;<sup>322</sup>
  - (e) dealing with the return of ashes to the family and the retention and disposal of unclaimed ashes;<sup>323</sup>
  - (f) providing for inspections of the crematorium<sup>324</sup> and its register and records<sup>325</sup> which must be carried out by a medical officer of health or health protection officer;<sup>326</sup> and
  - (g) restricting the cremation of bodies other than in an approved crematorium, unless the medical officer of health has granted permission to cremate the body elsewhere.<sup>327</sup>
- 8.39 As well as the Act’s requirement for ministerial approval before construction begins,<sup>328</sup> the Regulations also require approval to begin using the crematorium.<sup>329</sup> Approval is formally required by the Minister, but again, this has been delegated to the Ministry of Health Public Health team.<sup>330</sup>
- 8.40 The Minister is also empowered to direct the closure of a crematorium and can do so on two grounds:<sup>331</sup>

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316 Schedule 1, Form B.

317 Regulation 7(8), sch 1 (Form F). Medical referees are nominated by the crematorium operator and must be registered medical practitioners of at least five years’ standing. Their role is to ensure that individual cremations may properly proceed, including verifying the cause of death and the identity of the deceased, and checking that all reportable deaths have undergone the required coronial process before the body is cremated: see regs 6 and 7.

318 Regulations 9 and 10.

319 Regulation 10 authorises the attendant to require the opening of the casket for the purposes of identity verification if necessary.

320 Schedule 1 (Form H). The form lists the deceased’s full name, sex, age, date and place of death, date of permission or authority to cremate, date of cremation, method and date of disposal of the ashes, the signature of the person receiving the ashes, and the nature of the recipient’s relationship with the deceased.

321 Regulation 9(3).

322 Regulation 3(4).

323 Regulation 8. Unclaimed ashes must be retained and either stored for a specified period of time or decently interred or scattered by the crematorium authority.

324 Regulation 3(6).

325 Regulation 9(3).

326 See also Health Act 1956, s 7A, in relation to the designation of medical officers of health and health protection officers.

327 Cremation Regulations 1973, reg 4(1). See also reg 11. See, for example, media reports last year on a “home cremation” held in Southland where the deceased was cremated on a large fire over two days on the family farm without the necessary consents: Evan Harding “Family holds home cremation” *Fairfax NZ News* (online ed, New Zealand, 4 April 2012); Editorial “Ashes to ashes” *The Southland Times* (online ed, 5 April 2012). Police investigated but did not lay charges.

328 Burial and Cremation Act, s 38(2).

329 Cremation Regulations, reg 3(1).

330 This secondary approval requires a successful test firing of the cremator in the presence of the local health protection officer, and assesses the suitability of the applicants to operate a crematorium.

331 Cremation Regulations, reg 3(3). We understand from the Ministry of Health that this power has not been used, at least in the last 25 years, if ever.

- if the crematorium authority or any “member, servant, or agent thereof” has been convicted of an offence under section 56 of the Act<sup>332</sup> in relation to that crematorium; and
- if the local authority within whose area the crematorium is situated requests closure and the Minister is satisfied that is “expedient in the interests of health or by reason of a change in the character of the locality”.

### Crematorium bylaws

- 8.41 Bylaws are a form of subordinate legislation that give local authorities the flexibility to respond to particular issues within their district or region and to respond in a manner that is appropriate for their particular community.<sup>333</sup> As noted in chapter 5, bylaws are the central tool by which local authorities manage cemeteries under their control. The Act provides for a specific type of bylaw in relation to aspects of crematorium operation. These bylaws may be made for a range of purposes set out in the Act, relating to the maintenance and protection of the crematorium, the manner and time cremations are carried out, the extent of public access, and fixing fees.<sup>334</sup>
- 8.42 There is no obligation to have crematorium bylaws or that the bylaws cover the matters mentioned above. For example, the Hamilton City Council has detailed bylaws for its Hamilton Park Cemetery and Crematorium.<sup>335</sup> Other local authority crematoria bylaws are brief by comparison.
- 8.43 The New Zealand Standards Council has released a model bylaw relating to the operation of cemeteries and crematoria,<sup>336</sup> of potential application to crematoria “maintained by [a] Council”.<sup>337</sup> The model bylaw is relatively brief, providing some further detail about how long unclaimed ashes should be stored by a crematorium,<sup>338</sup> the fact that the casket should be made of an approved combustible material, and that the Council can determine the hours of operation of its crematorium.

### Resource Management Act 1991

- 8.44 Another part of the regulatory framework is the Resource Management Act, the purpose of which is to promote the sustainable management of natural and physical resources.<sup>339</sup> The resource consent process is the key stage at which community interests relating to the location of a crematorium are taken into account. A proposal to construct a crematorium may require resource consent in relation to land use; however this will depend on the rules contained in a local authority’s district plan and the policy objectives that underpin these rules.<sup>340</sup>
- 8.45 If a resource consent is required for the proposed activity, the local authority must also consider whether the consent should be notified, limited notified, or non-notified. A notified consent is one on which the public can make submissions, and on which any submitter may appeal the decision of the local authority to the Environment Court. Limited notification may confer this

332 See [8.35] above.

333 See Dean Knight “Power to Make Bylaws” [2005] NZLJ 165.

334 Burial and Cremation Act, s 40(1).

335 Hamilton City Cemeteries and Crematorium Bylaw 2012. The bylaw contains several provisions on permitted casket materials, fittings and dimensions; and detailed provisions on permitted locations for ash interments.

336 New Zealand Standards Council NZS 9201.14 (1999), s 1412. The model bylaw covers matters such as the period of retention of ashes, casket materials, hours of operation, restrictions on the opening of caskets and the deposit of documentation with the manager.

337 For example, Rotorua District Council has adopted the model bylaw in respect of the Rotorua Cemetery and Crematorium: Rotorua District Council General Bylaw (2011).

338 An approved urn containing the ashes may be left for 14 days free of charge at the crematorium. After three months the Council may dispose of the ashes in accordance with the Cremation Regulations.

339 Resource Management Act 1991, s 5.

340 For example, permitted activities do not require resource consent.

right on a smaller part of the community, such as close neighbours. A non-notified consent has no formal submissions process. Whether the consent is notified or not depends largely on the particular district plan and whether the proposed activity or building is controlled, discretionary or restricted discretionary under the district plan. The authority also has a residual discretion to notify the consent, and must publicly notify the application in certain circumstances, such as where the proposed activity is likely to have adverse environmental effects.<sup>341</sup>

- 8.46 All consents must be assessed for their effect on the environment and in some cases must consider alternative locations for the proposed activity or building. Similarly, all consents require Māori interests to be taken into account, through:
- recognising and providing for the relationship of Māori with ancestral lands, water, sites, wāhi tapu and other taonga;<sup>342</sup>
  - having particular regard to the principle of kaitiakitanga;<sup>343</sup> and
  - taking into account the principles of the Treaty of Waitangi.<sup>344</sup>
- 8.47 The Resource Management Act also requires particular regard to “the maintenance and enhancement of amenity values”,<sup>345</sup> which are defined as “natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes”.<sup>346</sup>
- 8.48 An application to build and operate a crematorium may also require a resource consent for emissions.<sup>347</sup> High temperature hazardous waste incineration is prohibited in New Zealand under clause 12 of the Resource Management (National Environmental Standards for Air Quality) Regulations 2004. However, crematoria are exempt from this prohibition. Nevertheless, the consent for emissions is typically subject to a range of conditions aimed at regulating and monitoring the physical effects of the crematorium on the surrounding environment; for example, it might specify required incineration temperature; composition and volume of emissions; permitted numbers of cremations per day or per year; and permitted times for cremation.<sup>348</sup> Air quality officers expect cremators to perform to standards similar to those prescribed for incinerators used to burn health care waste.<sup>349</sup> Operators are usually required to maintain a detailed log of their emissions and discharges, and must submit this data to the regional authority annually. The consent must be periodically renewed.

## ASSESSMENT OF THE FRAMEWORK

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- 8.49 In this section we raise for consideration some of the policy issues arising in relation to two of the key policy drivers identified:
- the need for public assurance as to the respectful handling of the deceased and their remains throughout the cremation process; and

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341 Resource Management Act, s 95A.

342 Section 6(a).

343 Section 7(a).

344 Section 8.

345 Section 7(c)

346 Section 2(1).

347 See Graham and Bingham, above n 284, at [8.1]. See also Chrystall and Rumsby, above n 284, at [3.2.10]–[3.2.11].

348 For an example of a non-compliance notice for resource consent breaches, see Jimmy Ellingham “Cremations moved after complaint” *Manawatu Standard* (online ed, 23 October 2010).

349 As noted in the *Guidelines for Establishing New Crematoria* (2004), available from the Ministry of Health.

- the public interest in minimising the risk of destroying evidence of criminal wrongdoing.
- 8.50 Our preliminary view is that the regulatory framework could be improved to enhance the protection of these interests. From our research we think that there may be gaps in guidance for the cremation sector on best practice, and a lack of transparency and rigour in approvals, inspection and auditing processes.
- 8.51 We also consider potential policy issues in relation to establishing new crematoria under the resource management process, and whether there are issues in relation to adequate access to cremation services.

### Respectful treatment of the body and ashes

- 8.52 As noted throughout this Issues Paper, we do not accept the assertion that no further harm can come to a person after they are deceased. Misconduct towards human remains is a criminal offence in New Zealand.<sup>350</sup> Respectful treatment is expected of crematorium operators at all stages: when receiving and storing the body, during the cremation itself, and in the handling and disposal of ashes. Ashes are the final tangible manifestation of the body and must be correctly labelled, handled and returned to the family.
- 8.53 There is no evidence of systemic problems or failures in the handling of deceased bodies by the cremation sector, although over the last few years the news media have reported on certain localised issues and individual one-off allegations and problems relating to the operation and processes of crematoria. These reports have included allegations against a crematorium of multiple simultaneous cremations without consent (refuted by the crematorium concerned); allegations against the same crematorium concerning the bulk disposal of a collection of metal bodily implants from the crematorium beneath a grave (also refuted by the crematorium concerned);<sup>351</sup> an operational problem with the cremation of an obese deceased person that resulted in black smoke and odours that gave rise to concerns in the local community;<sup>352</sup> a funeral director's failure to inter the ashes of an elderly couple for several years due to a "procedural glitch";<sup>353</sup> the failure of an Australian cremation company in delivering only part of the ashes of the deceased;<sup>354</sup> and a mix up resulting in the wrong body being cremated and farewelled at a Hamilton funeral service.<sup>355</sup>
- 8.54 Overseas, we are aware that there have been examples of more egregious compliance failures that resulted in reviews of the applicable regulatory framework.<sup>356</sup>

### Regulatory guidance

- 8.55 The Regulations do not contain provisions dealing with receipt or storage of the body before cremation, apart from the attendant's duty to check that the form for permission to cremate matches the identity of the person presented for cremation.<sup>357</sup> The risk of pacemakers or other

350 Crimes Act 1961, s 150.

351 Iulia Leiliua "Native Affairs - Grave Concerns" *Māori Television* (29 April 2013). See *R v Young*, (1984) 1 CRNZ 568 where a funeral director's conduct in cremating the bodies of babies with unrelated adults was found to be an offence under s 150(b) of the Crimes Act.

352 Olivia Carville "Cremation of 230 kg body goes wrong" *Fairfax Media* (online ed, New Zealand, 4 May 2012).

353 Libby Middlebrook "Funeral failings" *Fair Go*, TVNZ (13 June 2012) < <http://tvnz.co.nz> > .

354 Blair Ensor "Crematorium makes urn mistake" *The Dominion Post* (online ed, Wellington, 19 March 2012).

355 *Fairfax NZ News* "Wrong body in coffin" *Waikato Times* (online ed, 18 July 2008).

356 For example, at the Bayview Crematorium in New Hampshire in 2005, authorities discovered 12 sets of unlabelled, unidentified urns filled with ashes, a commingled cremation in process, a decomposing body left in a broken refrigeration unit, and incomplete and forged cremation permits and authorisations. As a result, a task group formed by the Governor of New Hampshire made comprehensive recommendations to improve the oversight of crematoria in the State and the Board of Registration of Funeral Directors and Embalmers is now responsible for crematory inspections. See William Sucharski, Philadelphia Crematory, Inc. "Why Crematory Due Diligence" < <http://c.ymcdn.com> > . See also Jack Encarnacao "N.H. crematorium probed - grim discovery at unlicensed facility" *The Boston Globe* (24 February 2005).

357 The crematorium authority may set bylaws regulating the casket material.

biomechanical aids exploding within the furnace is addressed by requiring the medical referee to certify that the body does not contain a pacemaker or other biomechanical aids or that they have been removed.<sup>358</sup>

- 8.56 On many matters, the Cremation Regulations are silent, such as how bodies should be received or stored while awaiting cremation (for example, minimum or maximum waiting times after receipt of a body and before cremation) or prohibited practices during cremation (such as commingling of ashes from different bodies). These matters may be provided for in the crematorium's bylaws, but doing so is not mandatory.
- 8.57 On other matters the Regulations give only partial guidance: for example, ashes should be retained for a "reasonable time", but this could reasonably be interpreted as anything from several weeks to several months or even years.<sup>359</sup> The Regulations also require crematoria to be satisfied that delivery of ashes to a particular person is "proper" if there are objections from other family members, but how they should go about doing this is unclear.<sup>360</sup>
- 8.58 At present, section 40 of the Act envisages a broad range of matters will be covered by crematoria bylaws (such as "the manner and method in which cremations shall be carried out"). However, because bylaws are optional not all crematoria will have them, and they will vary in their comprehensiveness. Nor does the model bylaw provide much detail about certain matters, such as commingling of ashes, the storage of remains, or the appropriate treatment of cremains.<sup>361</sup>

### *Industry guidance*

- 8.59 A potential issue is a lack of guidance about best practice on a range of issues. The establishment of a new Cemeteries and Crematoria Collective may fill the current gap in leadership and guidance in the sector.<sup>362</sup> One of the objectives of the Collective is to develop a code of practice for cemeteries and crematoria to ensure that deceased and their families receive a professional, safe and high quality service. The Funeral Directors Association of New Zealand (FDANZ) has also recently issued guidance for funeral directors who deal with ashes.<sup>363</sup> It recommends that funeral homes keep thorough records of who has a right to claim the remains and instructions for disposal or retention. Where no one can be found to take the ashes, FDANZ recommends making every reasonable attempt to contact the family; advising the applicant for cremation via registered mail that, unless instructions are given within 28 days, disposal will proceed at the crematorium's discretion; and advertising in local newspapers. It also provides a form to record actions taken over unclaimed ashes. FDANZ suggests that if after at least five years they have not been claimed, the ashes should be respectfully buried or scattered, for example at a local "beauty spot".

358 Cremation Regulations 1973, sch 1, Form AB.

359 Guidelines for the Disposal of Cremated Remains developed by the Funeral Directors Association of New Zealand suggest that ashes should be retained for a minimum of five years before they are disposed of by the crematorium.

360 See Burial and Cremation Act 2013 (SA), s 18(1) providing that the crematorium must not release cremated remains except to the person to whom the cremation permit was issued or a person authorised in writing by that person.

361 See New Zealand Standards Council NZS 9201.14 (1999).

362 The Cemeteries and Crematoria Collective has been established under the umbrella of the New Zealand Recreation Association, an organisation for recreation professionals, following the NZRA Cemeteries and Crematoria Collective Conference in June 2012. The Collective's terms of reference are available at < [www.nzrecreation.org.nz/professional-services](http://www.nzrecreation.org.nz/professional-services) >. The Collective's vision is "to become the lead support and advisory group in the NZ Cemeteries and Crematoria sector" and its purposes are "to lead the sector in delivering the best outcomes to the community and individuals touched by bereavement", and "to encourage a collective approach to sharing information, knowledge, expertise and professional development in the cemeteries and crematorium sector."

363 See further chapter 10, for a description of the role of FDANZ.

8.60 Our preliminary consultation suggests there is a perception in the industry that further guidance and clarity around best practice would be desirable.<sup>364</sup> It is apparent that dealing with unclaimed ashes is an area where best practice guidance might be useful,<sup>365</sup> and possibly also in relation to the cremation of the pets of the deceased.

### Detecting and reporting evidence of criminal conduct

8.61 One of the key tasks of the Act, in conjunction with the Coroners Act 2006, is to provide a process for triaging reportable and non-reportable deaths. Non-reportable deaths can proceed according to usual processes of disposition. Reportable deaths – including deaths that were “without known cause, suicide, or unnatural or violent” – must be referred to the Coroner.<sup>366</sup> This enables the cause of death to be ascertained as precisely as possible, so that suspicions of foul play, homicide or neglect of human life can be fully investigated. The ultimate objective of this process is to “identify practices that have cost human lives and then to modify and eliminate them”.<sup>367</sup>

8.62 Hence, there must be robust regulatory measures to guard against the misuse of cremation to conceal evidence of crime or neglect, whether intentionally or inadvertently, and to help minimise the risk of evidence being lost accidentally through errors or oversights. These measures must reflect the public interest in coronial processes being properly carried out, and they must enable the relevant offence provisions of the Act to be adequately policed and enforced.

8.63 We believe consideration could be given to strengthening the regulatory framework at four key points:

- when deaths are certified before cremation;
- when approving an operator to establish a crematorium;
- in requirements for keeping crematorium records; and
- on the inspection and auditing of records.

8.64 There is no evidence of systemic problems or failures in the cremation sector. We are not aware of any concrete examples of evidence of crime or neglect being destroyed in the cremation process. However the lack of regular and thorough inspections or external monitoring (other than of emissions) reduces the opportunity for any problems or potential problems to be detected. In our assessment, the existing framework has some potential weaknesses that create unnecessary risks of failures occurring and which therefore may fail to provide adequate public assurance.

### Death certification

8.65 Obtaining a death certificate is slightly more onerous where cremation is chosen, reflecting the perceived risk of the use of cremation to conceal evidence of neglect or criminal conduct. As well as obtaining a death certificate, those applying for cremation of a body must obtain a second medical certificate containing additional information about the circumstances surrounding

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364 See Olivia Carville “950 urns await collection” *The Press* (online ed, Christchurch, 16 July 2010); Kirsty Johnston “Province not tardy on ashes” *Taranaki Daily News* (online ed, 19 September 2009).

365 For example, the Hamilton Park Crematorium Bylaw 2012) provides that ashes not collected within 14 days of cremation will be returned to the funeral director or agent who delivered the deceased to the crematorium. Photo identification is required from the person specified to collect the ashes.

366 Coroners Act 2006, ss 13 and 15(2).

367 Law Commission *Coroners* (NZLC R62, 2000) at 1.

the death.<sup>368</sup> Last year, it was reported that district health boards were working to end the inconsistent charging practices of doctors for providing cremation certificates.<sup>369</sup>

- 8.66 We examined the certification process in an earlier Issues Paper and asked questions about some preliminary options for reform.<sup>370</sup> Our preliminary analysis was that despite onerous certification requirements, the system provides limited value because of the lack of independent auditing. We have received submissions on these questions and will develop recommendations in this area in our Final Report. At this stage, we draw attention to the discussion in the earlier Issues Paper.

#### *Approval of operators*

- 8.67 Crematoria operators are not required to be licensed. However, as outlined above, they must go through a two-stage approval process by the Ministry of Health before they can begin to operate. All crematoria, whether local authority-controlled or private, must be approved in this way. This approvals process constitutes an indirect but potentially crucial safeguard against a crematorium being operated in a way that would allow evidence of crime or neglect to be intentionally or inadvertently destroyed in the cremation process.
- 8.68 For these reasons, it is important that the approval process is robust. At present, however, is not clear whether police or background checks are routinely carried out, or whether the applicant must have a thorough understanding of the essential public interests that lie behind the death certification process and the need for rigorous record-keeping. Applicants are required to provide evidence of their suitability; however, it is not clear what criteria are applied in assessing this evidence. There is a case, in our view, for formalising the current ad hoc approach to approvals.

#### *Record-keeping and inspections*

- 8.69 Recording and auditing information about individual cremations is crucial to preventing and detecting criminal conduct or neglect and to providing public assurance that there is adequate oversight of crematorium operators. External auditing helps ensure that records are being properly kept and reduces the risk of systemic failure.
- 8.70 Under the Cremation Regulations, various processes must be gone through before the Permission to Cremate form can be filled out by the medical referee and cremation can proceed. The attendant must verify that the identity of the deceased matches the details on the Permission to Cremate form, although the Regulations do not require any record of this identity verification process to be kept. The Permission to Cremate form must be retained at the crematorium along with all other relevant documentation.
- 8.71 The Regulations provide for the records to be inspected “at any reasonable hour”. The crematorium itself can be inspected “at all reasonable times”. The Regulations are not explicit, but this could perhaps involve checking that all cremations have been accompanied by the Permission to Cremate form, or that the attendant has proper identity verification processes in place.
- 8.72 However, there is a lack of transparency about how often inspections occur and what is examined. Ministry of Health guidance for inspections of crematoria (as part of the inspection

368 Cremation Regulations 1973, sch 1, Form B.

369 Mathew Grocot “End looms for perk known as ‘ash cash’” *Manawatu Standard* (online ed, 15 November 2012); Sam Boyer “Union: ‘Ash cash’ fee put to good use” *The Dominion Post* (online ed, Wellington, 15 November 2012); Editorial “Doctors’ double-dipping can’t be justified” *The Dominion Post* (online ed, Wellington, 19 November 2012).

370 *Final Words: Death and Cremation Certification in New Zealand*, above n 284, at ch 4.

of cemeteries) is minimal, with the checklist noting only that the inspector must record the general condition of the building, check that the list of medical referees is current, check that records of cremation are being kept, and inspect the furnace area.<sup>371</sup>

### Community consultation

- 8.73 Today, crematoria can be found in a variety of locations: city, urban, or rural; residential, commercial or mixed use areas. No blanket restrictions apply as to location. Modern technology allows cremations to be carried out discretely with minimal emissions, allowing establishment of crematoria in a range of settings provided they comply with the relevant district planning laws. Figures from the Ministry of Health suggest that most new cremators established in recent years were installed in existing funeral homes, which are often located in commercial, mixed use or residential zones.
- 8.74 The placement of crematoria within communities requires an assessment of the impact of their emissions on the physical environment; however, there are also less tangible impacts on the environment, such as cultural or recreational enjoyment of an area, or the commercial attractiveness of an area. If the proposed location is close to social activities, cafes, or residential areas, it may be considered inappropriate or distasteful for bodily disposal to occur close by. There may be individuals or groups with specific cultural, religious or spiritual objections. In such cases it may not be appropriate to grant consent without providing an opportunity for those who live and work near a proposed crematorium to have their say.
- 8.75 These factors fall within the assessment of environmental effects under the Resource Management Act as they are relevant to the amenity of the area. However, the extent to which local residents and businesses can comment on the proposed location of the crematorium will vary according to the district plan of the particular local authority.
- 8.76 When a person applies for resource consent to open a crematorium at a specific location, the local authority will first decide whether the application should be notified, which in turn determines whether the public or affected members of the public can make submissions on it. We note that an application for a Christchurch crematorium was non-notified because of the business zoning of its proposed location and ultimately granted consent in 2010. However, local businesses have since expressed their concern that it is not an appropriate location for a crematorium.<sup>372</sup> Whether the consent is granted will depend on the local authority's assessment of environmental effects, in light of the status of operating a crematorium under the relevant plan, and any assessment criteria or standards contained in the plan.
- 8.77 Given the unique function of crematoria, some people might expect that the need for community consultation would be recognised within the regulatory framework. The Ministry of Health's approval process requires the applicant to have the necessary consents, but does not necessarily examine the appropriateness of the proposed location. In theory this should be adequately addressed by the resource consenting process, but it will depend on the detail of the particular plan.

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<sup>371</sup> Checklist for Inspection of Cemeteries at [9], available from the Ministry of Health.

<sup>372</sup> Sam Sachdeva "Sydenham locals 'not keen' on crematorium" *The Press* (online ed, Christchurch, 14 July 2011); Sam Sachdeva "Crematorium a 'dead end' for revitalisation" *The Press* (online ed, Christchurch, 12 October 2011); Sam Sachdeva "Petition calls for crematorium to go" *The Press* (online ed, Christchurch, 3 February 2012); Sam Sachdeva "Neighbours complain about crematorium smells" *The Press* (online ed, Christchurch, 24 May 2012). See also Corey Charlton "Stir over funeral home in shopping centre" *The New Zealand Herald* (online ed, Auckland, 9 March 2013); David Loughrey "Strong opposition to cremator bid" *Otago Daily Times* (online ed, 25 May 2010).

### Access to cremation services

- 8.78 The other side of the issue concerns the availability of cremation services to those who want them. Cremation is a cost-effective, convenient and accepted method of disposition amongst a large segment of the population, and in some areas of the country it is significantly preferred to burial.<sup>373</sup> People may have a strong preference for cremation for cultural or religious reasons, for reasons of cost, or because they would like to be able to scatter ashes in a particular place, either in New Zealand or overseas.
- 8.79 There are considerable differences in the distribution of crematoria throughout the country. This may mean some people who have a strong preference for cremation are required to travel significant distances.<sup>374</sup>
- 8.80 Where cremation services are available, we note that increased vertical integration of the industry may make it more likely that those opting for cremation, and who use a funeral director, are directed towards using that director's own cremation facilities. Consumer issues relating to the cost of funeral services and the bundling of funeral services are discussed in Part 2.
- 8.81 On the question of cost, preliminary research suggests significant differences in the cost of cremation around the country, and some Local Authority Survey responses confirmed that local authority crematoria generally offer cheaper cremation services than private crematoria operators, although this is not universally the case.<sup>375</sup>
- 8.82 Another factor affecting the provision of public cremation services is the level of investment required in maintenance and upgrade of plant. As noted above in the discussion of industry trends, local authority crematoria can require significant investment to upgrade or replace their cremators, as these cremators tend to be older, larger and more expensive to maintain (as they are designed to handle larger numbers of cremations) than the newer smaller cremators that are being installed in funeral homes.
- 8.83 These factors have led us to consider whether there are gaps in the provision of cremation services within a reasonable distance, and for a reasonable cost, that might need to be addressed in the regulatory framework. However, demand for cremation in less populated areas is necessarily lower and it might be unreasonable to expect that every district of New Zealand will have cremation services in the immediate vicinity.
- 8.84 In theory, low barriers to entry in this market should facilitate increased competition, greater consumer choice and lower prices.<sup>376</sup> If private providers are adequately meeting demand, it may not cause concern that there are no local authority providers. However, we are not aware of any private crematoria that will accept bodies directly from the public for cremation (without engaging a funeral director) while at least two local authorities (Nelson and Hamilton) do provide this service.
- 8.85 We note that section 25 of the Health Act 1956 enables the Minister of Health to require the local authority to provide cremation facilities, thus providing a backstop power if the lack

373 See, for example, Sue Newman "The way to go" *Ashburton Guardian* (online ed, 9 January 2012); Kasia Jillings "More Rotorua people choosing cremation" *Rotorua Daily Post* (online ed, 7 January 2012); Greg Taipari "Cremation gaining popularity – even with Maori" *Rotorua Daily Post* (online ed, 6 April 2010).

374 For example, the West Coast, see [8.16] above.

375 See Rob Stock "Are we too poor to die?" *Sunday Star Times* (online ed, Auckland, 6 May 2012) suggesting that the most basic no-ceremony cremation package is \$1500. See also Esther Ashby-Coventry "Cremation in Ashburton" *South Canterbury Herald* (online ed, 21 September 2011).

376 See above n 301.

of provision in a particular local market unduly impacts a community's access to cremation services (although to our knowledge, the provision has never been used).

- 8.86 What is important, in our view, is for local authorities to periodically assess demand for cremation services in their areas, the strength of private competition and the opportunities for local authorities to meet any residual demand on a cost-effective basis, whether through partnerships arrangements with private providers or as a local authority-controlled venture.
- 8.87 At this stage of our analysis we do not see a case for specifically addressing the issue of access to cremation services (including cost) through specific regulatory reform, although in Part 2 we discuss the option of requiring funeral services providers to unbundle their services, including cremation. However, we welcome comments on the question of access from the public and interested parties.

### **Preliminary observations**

- 8.88 As noted in this chapter, although there are anecdotal accounts of problems arising, there is not necessarily evidence of serious systemic or compliance failure in the sector. Modern computerised equipment provides the opportunity for thorough monitoring and record keeping by operators and our preliminary consultation suggests that operators take their responsibilities seriously in the key areas of emissions, cremation approvals, certification and record keeping. There is also a strong reputational imperative to ensure compliance and reliability.
- 8.89 Therefore, we do not base this discussion on documented compliance failures; rather our review is a stocktake of the framework in light of key changes that have occurred since it was established, and the influential public interests raised in this area. In our preliminary assessment, a number of significant changes to the cremation sector warrant the review of the regulatory framework to ensure that it is fit for purpose.
- 8.90 First, the number of cremations has risen steadily over the years and cremation is a far more common method of disposal for New Zealanders than when the regulatory framework was first developed. While public interest in natural burials may be predicted to increase, the relative cost comparison will mean that cremation is likely to remain the choice of the majority of New Zealanders for the foreseeable future. In our view, the popularity of cremation creates an imperative to modernise the regulatory framework, in order to provide the public with adequate assurance that it remains robust and effective to meet public expectations.
- 8.91 Second, the make-up of the sector has changed significantly, with the number of private sector providers notably increasing because of the availability of lower cost plant and equipment. This in our view creates an imperative to ensure that the regulatory framework is calibrated to the mix of providers and arrangements that make up the sector. Currently, for example, the framework contains features and powers that are not used in practice. The increasing diversity of the sector also highlights a lack of consistent minimum standards. Some members of the sector have begun to call for more stringent checks to protect the sector's integrity.
- 8.92 Third, as noted in relation to the cemetery sector, the wider legislative environment has changed significantly with the enactment of the Local Government Act and the Resource Management Act and the devolution of decisions about local activities to local government. The intersection of the framework with this legislation could in our view be improved, with the potential for local government to have a larger oversight role in place of current central government powers.

- 8.93 Fourth, other comparable countries have taken steps to strengthen their regulatory frameworks (features of which we explore in chapter 9), either through periodic reviews, or in response to one-off compliance failures. This leaves New Zealand's regulatory framework appearing relatively light by comparison. The requirements of the Cremation Regulations are minimal and focus on a narrow range of issues such as emission standards and physical operation of the plant. As noted in the first Issues Paper on death certification, although there are reasonably strong requirements around identification, certification and record keeping, they are of limited value because of the lack of consistent auditing. Arguably, current regulation does not provide the necessary degree of public assurance that adequate minimum standards are being consistently met.
- 8.94 In addition to these influential changes, we are mindful of the potential risk of serious harm should the framework prove to be inadequate. The public interests that operate are significant: for example, public safety, maintenance of the law, and public sensitivity to any breaches or failures to accord respect and dignity to the deceased and their families.
- 8.95 We are also mindful of the real risk in this sector that compliance failures may be hidden and unlikely to be uncovered. This risk is due to the nature of cremation processes, rather than the risk of unscrupulous operators. This in our view creates an imperative to ensure levels of oversight are set at an appropriate level to provide public assurance.
- 8.96 Finally, we note the asymmetries between regulatory requirements for the purpose of environmental protection, and regulatory requirements directed at other public interests such as the protection of law and order. Crematoria operating under resource consent conditions for emission levels are subject to reporting obligations with respect to those emissions, and these records must be regularly submitted to the regional authority. Records of the numbers and timing of cremations will need to be kept to demonstrate compliance with consent conditions. These records would arguably provide valuable data for audit purposes from a law enforcement perspective. For example, the data could be checked for discrepancies between the number of recorded cremations and the number of recorded firings.
- 8.97 On this basis of these various factors, we have reached the preliminary view that consideration of greater rigour in the framework is warranted.

# Chapter 9

## Cremation: options for reform

- 9.1 The previous chapter examined some of the potential weaknesses of the regulatory framework that applies to the cremation sector and the resulting risks. We hope to learn more about the nature of the problem and any actual harm in the consultation with the sector and with the public that will follow this Issues Paper, to supplement our preliminary conclusions that the level of change and inherent risks in the sector may warrant a more robust regulatory framework.
- 9.2 In this chapter we describe a range of possible approaches that could be considered in order to strengthen New Zealand's regulatory framework. The views and information provided by the sector and by the public in the consultation process will help to refine which approach would be most appropriate and beneficial to meet the challenges, risks and potential for harm that exist in this area.
- 9.3 We have carried out a preliminary assessment and comparison of New Zealand's regulatory framework with those of comparable countries that have been developed through a range of measures and regulatory tools, including codes of practice, guidance, regulation and primary legislation. In this chapter, we provide examples of regulatory tools from other jurisdictions and set out some preliminary options for reform to address some of the policy issues identified in the previous chapter. We welcome feedback on any of the questions, options or suggestions that are put forward for discussion.
- 9.4 These options should be considered in conjunction with the reform options outlined in Part 3 in relation to the funeral services sector. There will also be close linkages and dependencies in this area with recommended changes to death certification and the auditing of that process to be made in the Final Report.<sup>377</sup>

### GUIDANCE, STANDARDS AND SELF-REGULATION

#### A code of practice for crematorium operators

- 9.5 The Funeral Directors Association of New Zealand binds its members to a code of ethics and professional conduct and has begun to issue non-binding guidance to its members, for example relating to the handling of ashes.<sup>378</sup> However, we have no nationally recognised code of practice or conduct for crematoria operators in New Zealand, and no legislative requirement that a crematorium must develop its own code of practice. We note, however, that the newly formed Cemeteries and Crematoria Collective is supporting moves to create a code of practice for New Zealand crematoria operators.
- 9.6 We have found examples of codes of practice or codes of conduct used in many overseas jurisdictions. Some deal with specific operational matters. Some are more broadly-framed guidelines for ethical behaviour.

<sup>377</sup> For the issues raised in relation to death certification see Law Commission *Final Words: Death and Cremation Certification in New Zealand* (NZLC IP23, 2011).

<sup>378</sup> See ch 8 at [8.59].

- 9.7 In Alberta, Canada, every crematorium must have a code of practice governing the conduct of individual cremations covering at least identification, storage procedures and record-keeping; this is required by the Funeral Services Act 2000.<sup>379</sup> Overseas industry groups also release codes or guidelines that act as “best practice” standards for industry members to comply with, such as the United Kingdom Federation of Burial and Cremation Authorities’ “Code of Cremation Practice,”<sup>380</sup> and the Cremation Association of North America’s “Recommended Procedures”, which cover identification, holding requirements, cremation, and processing, packaging and disposal of ashes.<sup>381</sup>
- 9.8 The Australasian Cemeteries and Crematoria Association publishes a code of ethics on its website that includes requirements to provide exemplary service, to acknowledge and respect the importance to the bereaved and the community of burial and cremation services, and to be conscious and considerate of diverse religious, ethnic and cultural backgrounds and needs.<sup>382</sup>

### Regulatory standards

- 9.9 In our view, there is a case for expanding the Cremation Regulations so that baseline standards are clearly articulated. More robust, precise and consistent requirements for the handling of human remains would help ensure consistent respectful treatment of the deceased, reassure families who must place a high level of trust in crematoria operators, and bring increased certainty and clarity to crematoria operators.
- 9.10 We note that overseas regulatory frameworks include a variety of provisions for the handling of human remains during the cremation process that could be assessed for adoption in an updated version of the Regulations. We are not suggesting that all these provisions be adopted, but that the examples provide a useful tool for review. For instance, we have found the following express requirements in other regulatory frameworks:
- not to cremate within 48 hours after the time of death;<sup>383</sup>
  - to cremate within 24 hours of taking custody of the body;<sup>384</sup>
  - to store human remains awaiting cremation in a secure holding facility that is inaccessible to the public;<sup>385</sup>
  - to employ a system or use a method to identify remains throughout the entire cremation process;<sup>386</sup>
  - not to cremate the remains of more than one person at once without consent;<sup>387</sup>
  - not to cremate human remains with animal remains without consent;<sup>388</sup>
  - not to commingle cremated remains without consent;<sup>389</sup>

379 Funeral Services Act RSA 2000 c F-29, Alta Regulation 226/1998, s 36.2.

380 Available to members only at < [www.fbca.org.uk](http://www.fbca.org.uk) > .

381 Cremation Association of North America “Recommended Procedures for Handling Dead Human Bodies by an Authorized Crematory Authority” < [www.cremationassociation.org](http://www.cremationassociation.org) > .

382 Australasian Cemeteries and Crematoria Association “Code of Ethics” < [www.accaweab.com.au](http://www.accaweab.com.au) > . The Association also provides Crematorium Guidelines to members.

383 Cremation, Interment and Funeral Services Act SBC 2004 c 35, s 13(1).

384 Minnesota Statutes 2012, MN Stat § 149A.95.6a.

385 For example, Funeral and Cremation Services Council of Saskatchewan, Bylaws (revised 2012), 8010.

386 At 8050. See also Funeral, Burial and Cremation Services Regulation 30/11 SO 2002 c 33 (Ont), reg 186(3); Minnesota Statutes 2012, MN Stat § 149A.95.8.

387 Regulation 30/11 186(2)(a).

388 Regulation 186(2)(b).

389 Regulation 186(2)(c); Minnesota Statutes 2012, MN Stat § 149A.95.16.

- to carry out cremations in privacy and only to admit authorised persons, who must not “infringe upon the privacy of the remains of deceased human beings”;<sup>390</sup>
  - to remove, in so far as possible, all cremains from the cremator upon completion; to separate anything other than bone fragments; and to reduce the cremains to ashes, unless otherwise specified.<sup>391</sup>
- 9.11 As well as specific provisions, there is also the option of additional regulatory safeguards. For example, in South Australia, new legislation provides that a person may not be cremated unless the Registrar of Births, Deaths and Marriages has issued a cremation permit.<sup>392</sup> We also note that some frameworks have more detail about the responsibilities of the crematorium manager for the operation of the crematorium and the conduct of employees, and their duty to ensure that cremations are performed by adequately trained and supervised persons.<sup>393</sup>
- 9.12 For ashes specifically, the Regulations could include provisions such as:
- requirements for the collection of ashes in a suitable container;<sup>394</sup>
  - minimum time periods that unclaimed ashes must be retained before they can be disposed of;<sup>395</sup>
  - a requirement to have a code of practice respecting the disposition of cremated remains including how they will be identified; storage procedures; and records of the name and address of the person who took possession of the remains;<sup>396</sup>
  - a form to record actions taken in respect of unclaimed ashes.<sup>397</sup>
- 9.13 This is not an exhaustive list of the matters covered overseas but not mentioned in our Act or Regulations. They give some idea, though, of the scope of additional issues that could or should be addressed in a regulatory framework to ensure the proper standards for the handling of human remains.
- 9.14 Some of the standards may be considered so fundamental or important that they should be included in primary legislation (that is, in the Act or its eventual replacement), rather than in secondary legislation (the Regulations). For instance, the Ontario statute prohibits the operation of a crematorium without a licence.<sup>398</sup> The Alberta statute requires the retention of unclaimed ashes for one year.<sup>399</sup> The British Columbia statute includes timeframes, the right to require visual identification of remains, and basic container requirements.<sup>400</sup>

### Crematoria bylaw reform

- 9.15 As we noted in the previous chapter, crematorium bylaws allow operators some flexibility to self-regulate in certain areas. If the Regulations are revised to provide clear standards through a greater level of detail, the formal bylaw mechanism may no longer be needed as part of the

390 NPC NY § 1517(b)(1); see also Minnesota Statutes 2012, MN Stat § 149A.95.10.

391 Funeral and Cremation Services Council of Saskatchewan, Bylaws (revised 2012), 8060; Minnesota Statutes 2012, MN Stat §§ 149A.95.12 and 149A.95.14.

392 Burial and Cremation Act 2013 (SA), s 9(1). The maximum penalty is \$10,000 or 2 years imprisonment.

393 Alberta Crematory Regulation 248/1998, reg 6.5(1). See also Funeral, Burial and Cremation Services Regulation 30/11 2002 SO c 33, reg 22 “person in charge”.

394 Minnesota Statutes 2012, MN Stat §§ 149A.95.15.

395 Cemeteries Act RSA 2000 c C-3, s 31 (one year).

396 Funeral Services Regulation 226/1998 (Alta), reg 36.2(1).

397 The Funeral Directors Association of New Zealand has developed a suggested form of ashes register to assist members.

398 Funeral, Burial and Cremation Services Act SO 2002 c 33, s 6(1).

399 Cemeteries Act RSA 2000 c C-3, s 31.

400 Cremation, Interment and Funeral Services Act SBC 2004 c 35, ss 10, 11 and 13.

regulatory framework. In that case, crematoria would still be able to develop suitable policies to suit their circumstances within the parameters of the regulatory framework. However, it may prove useful to retain a method by which individual crematoria can opt to select their own particular rules in certain areas. For example, a certain matter might be governed by regulation, while permitting an individual crematorium to explicitly depart from the default position if it so chooses.

- 9.16 For instance, the Ontario cremation regulations impose a general prohibition on animal cremations, unless specifically authorised by the crematorium’s bylaws.<sup>401</sup> This recognises that there may be significant local demand for animal cremations, which would be permissible if properly regulated by the crematorium. The Ontario regulations also contain additional restrictions that can only be departed from with written and signed consent of the person purchasing cremation services. These restrictions relate to cremation of more than one person at once, cremation of human and animal remains together, and the commingling of cremated remains.<sup>402</sup>
- 9.17 Flowing on from this is the question of whether the model bylaw issued by the New Zealand Standards Council could be more detailed. At present it covers a limited number of issues and in minimal detail. A more detailed model bylaw might provide valuable assistance for crematoria operators who have indicated there is a lack of guidance. Alternatively, a code of practice for crematorium operators might fulfil the same function.
- 9.18 Another issue to be addressed is the extension of the bylaw-making power to private crematoria (which to our knowledge has never been used). It is relatively unusual for a private entity to have bylaw-making powers. That is a function that is usually associated with a public entity, such as a local authority. The only other example on the New Zealand statute book of a private entity having a power to pass bylaws for its own area of operation is airport authorities, which may include private airports, under the Airport Authorities Act 1966.<sup>403</sup>
- 9.19 Our proposal is for the role and function of crematoria bylaws in the regulatory framework to be reviewed and reassessed, in conjunction with the review of the Cremation Regulations.

## OVERSIGHT

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- 9.20 Our preliminary view is that the oversight component of the regulatory framework could usefully be strengthened in the following areas:
- the approvals process for crematorium operators; and
  - inspections and auditing of crematoria.

### A licensing regime for crematorium operators

- 9.21 We have given preliminary consideration to whether crematoria operators should be subject to a licensing regime, as an alternative to the approval process currently required by the Regulations (the approval to commence operation). The advantages of a licensing regime could include reducing the risk of criminal conduct going undetected, greater confidence as to the respectful handling of human remains, and contributing to a robust regulatory framework that provides sufficient public assurance.

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401 Ontario Regulation 30/11, r 189(3), made under the Funeral, Burial and Cremation Services Act SO 2002 c 33.

402 Ontario Regulation 30/11, r 186(2).

403 Airport Authorities Act 1966, s 9. An airport authority is defined as any local authority with control over an airport, but also “includes any person or association of persons authorised ... to exercise the powers of a local authority” (s 2).

- 9.22 A licencing regime would enable ongoing scrutiny of crematoria operators, as licences can be issued for a specified period of time and require renewal. Conditions could be imposed, such as a requirement to complete certain training or demonstrate particular competencies or cultural awareness. A licence could be suspended or revoked if the licensee consistently fails to meet minimum standards. Licences could be required to be displayed on-site or made searchable online, providing reassurance for clients of the crematorium.
- 9.23 In the Canadian provinces of Ontario, Saskatchewan, Alberta and British Columbia, crematoria are required to be licensed.<sup>404</sup> An independent regulatory board established by statute is responsible for oversight of the licensing regime in each province, including granting the licence, monitoring ongoing compliance, and receiving complaints.
- 9.24 In the state of New York, 44 out of 47 active crematoria are operated by not-for-profit corporations. Any employee of a crematorium “whose function is to conduct the daily operation of the cremation process” must be certified by an organisation approved by the Cemeteries Division of the New York Department of State.<sup>405</sup> Certification must be renewed every five years and proof of the certification must be posted in the crematorium and be available for inspection.
- 9.25 New Zealand has a variety of licensing models, including the licensing of sectors such as private security and gambling through an enforcement unit within the Department of Internal Affairs,<sup>406</sup> and the licensing of sectors such as food, liquor, health and hygiene by local authority health inspectors.
- 9.26 We note that a new licencing regime for crematoria operators would align with the option in Part 3 of this paper for funeral services providers to be licensed.<sup>407</sup> It may be desirable to mirror that regulatory approach in the crematorium sector, especially as the two sectors have an increasing amount of crossover as increasing numbers of funeral directors open their own crematoria on-site. The two licensing regimes could share administrative resources; for instance local authority health inspectors could be tasked with considering applications, granting licences, and monitoring conditions and compliance under both regimes. Alternatively, an assessment of the risk profile within the cremation sector may suggest that it would be desirable for central government oversight of a licensing regime.
- 9.27 If licensing is not favoured as an option, and the approvals process is retained, an alternative option would be to strengthen the assessment of suitability to operate a crematorium, such as requiring a police check on every applicant and key personnel such as the registrar, attendant and medical referee, and ensuring that the applicant demonstrates adequate understanding of the regulatory framework and policy drivers, in particular the death certification requirements and record-keeping requirements.
- 9.28 Our preliminary assessment, however, is that the weakness of the current approvals process warrants consideration being given to a licensing regime for crematorium operators, and that is currently our preferred option.

### Inspections and audit

- 9.29 An option we put forward for consideration is a more robust inspection and audit process within the regulatory framework. Regular inspections and monitoring could decrease the risk

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404 See Funeral, Burial and Cremation Services Act SO 2002 c 33, s 6(1); Cemeteries Act SS 1999 c C-4.01, s 8; Cemeteries Act RSA 2000 c C-3, s 27; Cremation, Interment and Funeral Services Act SBC 2004 c 35, s 55.

405 NPC NY § 1517(j).

406 See Department of Internal Affairs *Minimising Harm – Maximising Benefit: the Department of Internal Affairs' Approach to Compliance and Enforcement* (2012).

407 See ch 12 at [12.29]–[12.40].

of standards failures in relation to the respectful treatment and handling of human remains. Inspections should also monitor the recording and storage of information, such as permissions to cremate, which play a crucial role in preventing and detecting criminal conduct or neglect.

- 9.30 In Victoria, Australia, the Cemeteries and Crematoria Act 2003 sets down a fairly detailed process for inspections of trustee-managed cemeteries, who are the sole authorised providers of crematoria. The Act sets out the powers of authorised officers appointed under the Act to enter and inspect “any place being used as a crematorium” during normal business hours.<sup>408</sup> Their powers are wide-ranging, including a power to require persons to answer questions, a power to test any equipment or facilities, and a power to seize any document or equipment if it is believed to relate to a contravention of the Act or the regulations.
- 9.31 In the United Kingdom, the Cremation (England and Wales) Regulations 2008 include a basic requirement that a cremation authority enable inspections at any reasonable time by a person appointed by the Secretary of State.<sup>409</sup> The Federation of Burial and Cremation Authorities also has an inspection role.<sup>410</sup> The Federation visits 16 crematoria per year, occasionally accompanied by government representatives, makes an audit of the statutory and operational requirements, and writes a report which it sends to the relevant crematorium.<sup>411</sup>

### Education and training

- 9.32 Overseas, there are specific legislative provisions and requirements for education and training. In Alberta, Canada, for instance, all crematoria must have a manager who is responsible for operations, the conduct of employees, and for ensuring that cremations are performed by “adequately trained and supervised persons”. All crematory managers may be required to complete continuing education programmes and courses.<sup>412</sup>
- 9.33 There are moves to create a recognised qualification for crematoria in New Zealand, but as yet there is no formal provision for training or education of crematoria operators.<sup>413</sup>
- 9.34 We understand from the Cemeteries and Crematoria Collective that unit standards for cemeteries (incorporating burial and cremation) are in currently being developed by the primary training organisation responsible for the horticulture and agriculture sector. These unit standards would provide an approved qualification for crematorium operators. The push to create recognised qualifications for operators of crematoria in New Zealand would create a degree of symmetry with the funeral sector and encourage best practice. We wonder whether completing those training requirements should be a compulsory precondition to operating or managing a crematorium. That could be considered in conjunction with the licensing proposal discussed above.

### ROLE OF THE RESOURCE MANAGEMENT ACT

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- 9.35 As we note in the previous chapter, the only opportunity for taking account of community concerns about the location of crematoria is the resource consent process under the Resource Management Act 1991. The two-stage approvals process completed by the Ministry of Health, in coordination with local health protection officers, does not appear to necessarily examine

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408 Cemeteries and Crematoria Act 2003 (Vic), s 163.

409 Cremation Regulations 2008 (England and Wales), reg 5(1).

410 The Federation is an association that represents approximately 90 per cent of all cremation authorities in the United Kingdom, and which plays a quasi-public role in providing guidance and regulating the operation of crematoria.

411 See < [www.fbca.org.uk](http://www.fbca.org.uk) > .

412 Funeral Services Act, Alta Regulation 226/1998, regs 19.1 and 29.

413 For discussion of education and training in relation to funeral services providers, see above at [10.42].

the effect of the crematorium on those who live, work and play in the area. But one might expect the regulatory framework to take greater account of the unique effect of the presence of a crematorium on the community in which it is located.

- 9.36 We have identified some preliminary options to strengthen public participation about new crematoria. The main option we put forward would be to establish a presumption that all new crematoria would require a resource consent, and that an application must be publicly notified. As secondary options we also consider whether public consultation should become an element of the approvals process, and whether location restrictions should be included in legislation or regulations.
- 9.37 Our preliminary view is that the issues that impact on the local area or community are quintessential resource management issues, and so we prefer the first option at this stage. However we seek feedback on the range of these options identified to improve the level of community consultation.
- 9.38 We also propose that questions about the closure of crematoria should be considered under the Resource Management Act framework.

### **Resource Management Act - mandatory public notification**

- 9.39 Our preferred option is that a National Environmental Standard, such as the standard we propose in chapter 7 in relation to cemeteries, could classify the establishment of a crematorium as a discretionary activity, and require public notification of the consent application.<sup>414</sup> This would introduce a consistent approach to the public notification of applications for consent to establish new crematoria, and enable public input into the consenting process.

### **Approvals process**

- 9.40 In chapter 7 we proposed that responsibility for certain matters relating to the management of cemeteries could be devolved to local authorities.<sup>415</sup> Similarly, local authorities could assume responsibility for the approval process for establishing a new crematorium. Local authorities are well placed to consider the effect of the crematorium on the local community.
- 9.41 This is the case in Ontario, where the local municipality is responsible for approving the opening of a new crematorium.<sup>416</sup> The local municipality must grant the approval if it is in the public interest. The municipality can hold a hearing to determine whether that is so. It must approve or refuse within a reasonable time after receiving the request. It must publish its decision in a local newspaper, and its decision is open to appeal.
- 9.42 One option is that the local authority could be required to notify the public of the application and accept public submissions; it would inspect and assess the proposed site from a community interest perspective, and it would assess the balance of the public interest in granting or declining the approval.
- 9.43 If local authorities assumed responsibility for the approvals process, they would have the dual role of handling both approvals and resource consents. Public submissions to each process could be co-ordinated, although each process would remain separate and governed by different statutes. On balance, we note that this could result in duplication of consideration of similar issues if there are two separate processes for approvals and resource consent. Under the

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414 See Resource Management Act 1991, s 87A(4) and 95A(2)(c).

415 Similar issues arise in ch 12 regarding the regulation of funeral directors, and in ch 18 regarding disinterment licensing.

416 Funeral, Burial and Cremation Services Act SO 2002 c 33, s 83(3) (except if the crematorium is to lie on Crown land “without municipal organization”).

Resource Management Act, consent authorities are required to have particular regard to the maintenance and enhancement of amenity values, and consider the balance of environmental effects including social, economic, and cultural effects on people and communities. We consider that this is broad enough to allow for adequate consideration of the relevant public interests. Therefore, we prefer the option of public notification under the Resource Management Act and consideration of the effects of establishing a crematorium under the consents process.

### Location restrictions

- 9.44 Another approach used in other jurisdictions is to include a prohibition on the siting of crematoria in certain areas within primary legislation. For instance the Crematorium Act 1902 (UK) prohibits construction of a crematorium within 200 yards (180 metres) of any dwelling, except with consent of the owner, lessee or occupier; or within 50 yards (45 metres) of a public highway; or within the consecrated part of a burial ground.<sup>417</sup> This restriction also applies in Scotland, and the Scottish Burial and Cremation Review Group recommended in 2010 that it be retained, noting that it ensures a level of privacy and quiet for visiting mourners, helps prevent adverse effects on adjacent houses, and protects the public.<sup>418</sup>
- 9.45 The Cemeteries and Crematoria Act 2003 in Victoria, Australia, prohibits a crematorium being established and operated “in any area set aside for interments of persons of a particular religious denomination or faith or community or other group”.<sup>419</sup>
- 9.46 We note that the Ministry of Health’s guidelines suggest a crematorium should not be sited nearer than 200 metres to any residence, except with the consent of the owner, lessee and occupier of the residence, nor within 50 metres of a public highway,<sup>420</sup> although the Ministry advised us that in considering location, its approval process is now based on council planning requirements and resource consent conditions. The question we raise for consideration is whether a limitation of this sort should be encapsulated in the primary legislation. Alternatively, a restriction of this type could be contained in a National Environmental Standard, complementing the option presented above.
- 9.47 A restriction on siting might be considered desirable if it is thought that it is always inappropriate for crematoria to be located in certain places for cultural or other reasons. Such a provision would amount to a clear statement of public and community interests within the regulatory framework. However, the option of strengthening the opportunity for public consultation under the resource management framework may be sufficient to take account of these interests without imposing specific siting restrictions.

### Closure of crematoria

- 9.48 As noted in chapter 8, the Cremation Regulations permit the Minister of Health to direct the closure of a crematorium where an offence has been committed, or where a local authority requests closure and the Minister is satisfied that closure is “expedient in the interests of health or by reason of a change in the character of the locality”.

417 Crematorium Act 1902 (UK), s 5.

418 Burial and Cremation Review Group *Death certification, burial and cremation* (consultation paper, 2010) at [99].

419 Cemeteries and Crematoria Act 2003 (Vic), s 21.

420 Ministry of Health *Guidelines on the Siting and Construction of Crematoria* (1992).

- 9.49 We propose that closure of crematoria in response to misconduct by the operator could be dealt with under a licensing framework as discussed above. We also suggest that review of consent conditions for air discharge is likely to be the appropriate response to public health issues, and that concern relating to “changing locality” can be more appropriately addressed through the resource management framework.

#### CONSULTATION QUESTIONS

- Q7 Do you think those who operate crematoria should be licensed? Please give reasons.
- Q8 Do you think resource consents should be required for all new crematoria and should they be publicly notified under the Resource Management Act?
- Q9 Do you think there should be stronger regulatory controls over the operation of crematoria and the handling of human ashes by crematoria?
- Q10 Do you think there is a problem with the availability of cremation services in any particular area of New Zealand?

#### *Additional questions*

- 9.50 In addition to the questions posed above, we also raise the following questions for consideration by those who wish to address or respond to them.
- (a) In your view, what are the most important elements of a licensing regime? For example:
- verifying suitability of crematorium operators;
  - verifying standards and policies;
  - verifying compliance through inspections and audit;
  - mandating education and training requirements;
  - other elements – please describe.
- (b) In what circumstances should central or local government be able to require closure of a private crematorium?
- (c) Which controls for the operation of crematoria and the handling of human ashes do you regard as most important? For example:
- minimum and maximum time limits on carrying out cremation after receipt of the body;
  - security processes for holding the body prior to cremation;
  - limits on multiple cremations without consent;
  - treatment of ashes and limits on commingling ashes without consent;
  - retention and disposal of ashes by crematorium;
  - supervision of crematoria employees;
  - any other controls – please describe.

(d) If you have views and comments about any particular aspect of the regulatory framework for cremation, please outline these below. For example:

- guidance, standards and codes of practice;
- regulations and approvals;
- licensing and inspections;
- education and training;
- resource consents and community consultation;
- any other aspect of the regulatory framework.

**Part 3**  
**FUNERAL  
SERVICES: THE  
ADEQUACY OF  
THE REGULATORY  
ENVIRONMENT**



**LAW · COMMISSION**  
**TE · AKA · MATUA · O · TE · TURE**

# Chapter 10

## Funeral sector overview

### INTRODUCTION

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- 10.1 Our terms of reference require us to consider the regulation of funeral directors, and specifically whether the status quo should be retained or whether an alternative system of regulation should be instituted. At some stage in our lives, most of us will experience the death of a loved one and will have to consider how to go about organising a funeral. This will generally be done with the assistance of a funeral director, who will provide a range of services.<sup>421</sup> Because of the widespread use of funeral directors, we consider that developing the appropriate regulatory framework for this service is an important matter of interest for New Zealanders.
- 10.2 In this Part, we provide an overview of New Zealand's funeral services industry and a preliminary assessment of some of the issues beginning to emerge. We begin in this chapter by describing this industry in more detail and outlining the legal and regulatory environment within which funeral directors operate. In chapter 11 we discuss the unique characteristics of the market in which funeral services are provided and ask whether existing regulation is effective and fit for purpose or whether there is a case for reform. In chapter 12 we set out a range of preliminary proposals designed to address some of issues we have identified in the course of our initial research and consultation.

### FUNERAL DIRECTING IN NEW ZEALAND

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#### Emergence of the funeral director

- 10.3 In the 19th century, funerals of European New Zealanders were conducted with the help of family members, members of the community, and churches. Many iwi continued to use traditional techniques to prepare a tūpāpaku for a tangihanga. Paid assistance may have been received from an undertaker, whose role was much more limited than that of the modern day funeral director. Many were carpenters who built coffins and practised undertaking as a secondary occupation outside of normal working hours. Their role was largely limited to providing the coffin and transporting the body from home to church, and from church to cemetery.
- 10.4 In the 20th century, the part-time business of undertaking became the full-time occupation of funeral directing. In part, this may have been a response to the change in attitude towards death at the end of the 19th century, when surrounding issues of hygiene and contagion started to be seen as problems that required a scientifically informed response. Those working in this area came to see themselves as providing an essential and skilled service and emphasised the difficult and technical aspects of preparing the body and organising the funeral.
- 10.5 In the 1960s and 1970s, growing understanding of the psychology of bereavement led funeral directors to focus equally on the needs of the living and to include basic counselling skills in education courses offered to the profession. Some funeral directors also carried out embalming

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421 C Schafer "Dead serious? Funeral directing in New Zealand" (2008) 4 Sites: A Journal of Social Anthropology and Cultural Studies 95 at 95.

and, as techniques improved, began to promote it as a highly beneficial process and one requiring considerable training and skill to execute well. We are now seeing a similar expansion of funeral directors into offering on-site cremation services.<sup>422</sup>

- 10.6 Today, the full range of services offered by a funeral director includes picking up the body from the place of death; embalming and preparing the body for viewing; arranging the funeral service including music, flowers, a memorial booklet and catering; and arranging a celebrant, or acting as a master of ceremonies in lieu of a celebrant or religious officiant. The funeral director may then transport the body to the cemetery or a crematorium, or if they have a crematorium can provide direct cremation on-site. We note that funeral directors who operate crematoriums on-site are subject to the additional regulatory requirements imposed on “crematorium authorities” as defined in the Cremation Regulations.<sup>423</sup>
- 10.7 The vast majority of New Zealanders are embalmed after death. The process of embalming preserves the body after death and interrupts the progress of decay. The level of embalming can vary, from the injection of formaldehyde or an alternative antibacterial agent into the abdominal cavity to slow bacterial growth, to full arterial embalming where bodily fluids are replaced with an embalming solution. Most funeral directors provide access to embalming services, but these are separate skill sets and many funeral directors employ embalmers rather than undertaking this aspect of service provision themselves.

### Recent Trends

- 10.8 The emergence of a professional funeral services industry in Western societies over the past century has been subject to much comment.<sup>424</sup> Some suggest that this service industry has developed alongside the decline of organised religion and the rise of a service sector performing roles formerly assumed by volunteers within a community.<sup>425</sup> At the same time, commentators have also noted a desire for the families of the deceased to have greater direct involvement in preparing the funeral.<sup>426</sup> Funeral directors with whom we have consulted confirm these trends and note that the way in which they carry out their business is changing in response.
- 10.9 The funeral sector is also subject to the normal economic and market forces that shape any business and in New Zealand as elsewhere these are resulting in a number of developments that have a potential impact on consumer choice, costs, and standards. We comment on some of these changes below.

### Structural change

- 10.10 In the past New Zealand’s funeral sector was dominated by small to medium-sized owner-operated businesses, many of them with long-standing connections to their local communities. While family-owned and operated funeral homes remain a feature of the sector changes are occurring at both ends of the market. During our consultation with cemetery providers and funeral directors we were informed of a growth in the number of small (one or two-person) businesses, sometimes with little or no industry experience or formal training. In some cases these may be focusing on providing lower cost alternatives or servicing specific niche markets.

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422 The Funeral Directors Association of New Zealand (FDANZ) estimates that around 20 per cent of its members now operate their own crematoria. Law Commission “Survey of Funeral Directors” (November 2012) [Funeral Directors Survey]. This survey was distributed to the Funeral Directors Association of New Zealand (FDANZ) and New Zealand Independent Funeral Homes (NZIFH), who passed it on to their respective members. Both FDANZ and NZIFH provided summaries of member responses.

423 See ch 8.

424 Schafer, above n 421.

425 Ruth McManus *Death in a Global Age* (Palgrave Macmillan, Basingstoke, Hampshire, 2013) at 96.

426 Sally Raudon “Contemporary funerals and mourning practices: An investigation of five secular countries” (paper reporting on research undertaken with the support of a 2010 Churchill Fellowship, New Zealand, December 2011).

- 10.11 In contrast, some evidence suggests that large corporations may play an increasingly significant role in the market, whereby one parent company may provide a range of funeral services through various subsidiaries, including operating several funeral homes, operating cremators and importing caskets. For example, the Australian-based company InvoCare has become a significant provider of funeral services in New Zealand since purchasing the Bledisloe group in June 2011.<sup>427</sup> The InvoCare group operates funeral homes, crematoria, and cemeteries throughout Australia and now owns 16 funeral homes in New Zealand.<sup>428</sup>
- 10.12 Vertical integration is another feature of the more mature market. This is where funeral directors act as a “one-stop shop” for a range of funeral services including chapel facilities, function rooms, caskets and options for the storage and interment or scattering of ashes. This includes cremation, with an increasing number of funeral homes either purchasing existing stand-alone crematoria or installing a cremator in their own buildings.
- 10.13 The trend in vertical integration is not, however, limited to larger-scale operators who own several different funeral homes. For example Paterson’s Funeral Services in Ashburton is an independent owner-operated funeral home which provides chapel facilities, catering, manufactures its own coffins, and also operates the only crematorium in the district. Whether vertical integration arises as existing family funeral homes expand or as these funeral homes amalgamate or are bought and sold, this trend is an interesting feature of the contemporary funeral sector and demonstrates how comprehensively the industry has changed over the past century.

### *Natural alternatives*

- 10.14 Many funeral homes in New Zealand now offer a “natural alternative” to some aspects of funeral preparation. For instance, most funeral directors stock at least two different brands of New Zealand-made eco-coffins.<sup>429</sup> In the major centres some providers of funeral services incorporate natural preparation philosophies into all aspects of their business. This trend is driven by a belief that preparing the deceased for burial or cremation can be simple and non-invasive, while still dignified and hygienic. An example is State of Grace Funerals in Auckland, which describes itself as “a natural funeral service, with eco-coffins, no unnecessary embalming, and with encouragement for family and friends to participate as much as they are comfortable doing”.<sup>430</sup>
- 10.15 Although most dead persons in New Zealand are still embalmed, the growth of the natural funeral movement suggests that there is demand for an option that interferes less with natural decomposition processes. Funeral directors from the industry’s main self-regulatory body, the Funeral Directors Association of New Zealand (FDANZ), have noted that they will always try to meet the wishes of the family. However, they also perceive a need to be cautious, as some families may like the idea of a natural funeral, but may not fully appreciate the implications.<sup>431</sup>
- 10.16 The different philosophies of natural preparation and traditional preparation both seek a funeral outcome that is consistent with the wishes of the family and the likely wishes of the deceased. It appears that the sector overall is responding to changing preferences, and we should anticipate greater diversity in funeral practices in future.

427 Alan Wood “Aussie funeral home company buying into New Zealand” (23 June 2011) *Stuff* < [www.stuff.co.nz](http://www.stuff.co.nz) > .

428 Through a subsidiary, InvoCare New Zealand Ltd.

429 These are the “Tender Rest” and the “Return to Sender” range.

430 See < [www.stateofgrace.net.nz](http://www.stateofgrace.net.nz) > .

431 For an example of this situation, see [11.22].

### *Direct family involvement and “DIY” funerals*

- 10.17 Alongside this interest in more natural approaches to death, many funeral directors report that even in the context of traditional funerals it is becoming much more common for families to request personal involvement, such as washing or dressing the body. Some ethnic and religious groups, including the members of Muslim, Jewish, and Sikh faiths, require ritualised cleansing and dressing of the body, and may arrange to do this at the premises of an established funeral director or at the home of the deceased’s family. Funeral directors have told us that they attempt to be as accommodating as possible; for example many now provide temperature-controlled rooms where the family can sit with the body so it is never left alone.
- 10.18 At the same time our Local Authority Survey revealed a small but increasing number of enquiries about burial or cremation without the involvement of a funeral director. Many local authorities have expressed concern that they are not set up to deal directly with the public and discourage these “DIY” funerals. However, funeral directors are not legally required to be involved in a funeral and it is possible for families to purchase or make the casket themselves, transport the body and liaise directly with the cemetery manager or with a crematorium, provided all legal requirements for handling the body are complied with.<sup>432</sup> Funeral directors also note that this trend is increasing, possibly from a mixture of cost drivers and the desire for greater personal involvement.
- 10.19 Increased demand for this option requires us to consider how families can be supported to comply with the legal requirements in relation to the burial when they opt not to engage professional services. For instance, cemetery managers and funeral directors have expressed some concerns about potential implications of DIY funerals such as the need to ensure paperwork is properly filed by the family.

## **THE REGULATORY FRAMEWORK**

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- 10.20 Very few legal obligations are imposed on “funeral directors” as such.<sup>433</sup> However, the legislation and regulations impose a number of duties on persons “having charge of a body” or who are “undertaking the preparation of a human body for burial” or anyone who “disposes of a body”. Funeral directors therefore assume a number of legal obligations by virtue of their involvement in the funeral and having custody of the body. As persons who are offering services to the public for a fee, they must also comply with general consumer laws. Health and safety laws also apply.
- 10.21 Section 46E of the Burial and Cremation Act 1964 (the Act) imposes a duty on a person “having charge of a body” to dispose of it “within a reasonable time”.<sup>434</sup> Failing to do so might amount to the offence of neglecting to perform a duty imposed by law with reference to the burial or cremation of a dead person, which carries criminal sanctions.<sup>435</sup> Prompt disposal is also required by the Health (Burial) Regulations 1946.<sup>436</sup> In addition, as the person “who disposes of a body”, the funeral director is responsible for registering the death under the Births, Deaths,

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432 The legal requirements include disposing of the body within a reasonable time and registering the death with the Births, Deaths and Marriages Office at the Department of Internal Affairs within three days of the body being buried or cremated. However, a body may not be disposed of until a medical certificate of death is obtained, and a cremation certificate is also required if the body is to be cremated. The Department of Internal Affairs has prepared a guide to these requirements: See Department of Internal Affairs *Before Burial or Cremation* < [www.dia.govt.nz](http://www.dia.govt.nz) > .

433 The Burial and Cremation Act defines “funeral director” as “a person whose business is or includes disposing of bodies”, while the Health (Burial) Regulations 1946 use the following definition: “a person who in the course of his business carries out burials and matters incidental thereto, and includes a person who holds himself out as prepared to carry out burials.”

434 Burial and Cremation Act 1964, s 46E. The Act does not define the term “reasonable time”.

435 Crimes Act 1961, s 150(2).

436 Health (Burial) Regulations 1947, reg 35.

Marriages, and Relationships Registration Act.<sup>437</sup> In practice the funeral director also assumes responsibility for obtaining the Medical Certificate of Death, and the cremation certificate if needed.

- 10.22 The Act also contains legal duties which apply when custody of the body is transferred. Section 46F stipulates that a person having charge of a body must not transfer charge of it to another person, unless documentation is first obtained stating that the person receiving the body accepts responsibility for the final disposal and registration of death. There is an exception to this obligation when a person who is not a funeral director transfers the charge of the body to a funeral director.<sup>438</sup>

### Health (Burial) Regulations 1946

- 10.23 Hygiene standards for funeral homes are contained in the Health (Burial) Regulations 1946. Under the Regulations, funeral directors must be registered with local authorities.<sup>439</sup> Registration of funeral directors is for record-keeping purposes only, and there are no grounds for refusing a registration application. In practice, local authorities check that standards of the mortuary<sup>440</sup> meet the requirements of the Regulations, which are focused mainly on hygiene,<sup>441</sup> and register funeral directors operating from mortuaries (ie funeral homes) that meet those requirements.<sup>442</sup> However, different local authorities have adopted different policies, so standards for registration may vary slightly across the country. Local authority representatives note that their mortuary inspection function provides important independent oversight for the purpose of public health, but question the value of a registration process for funeral directors in the absence of minimum standards.
- 10.24 However, funeral directors have generally informed us that industry practice significantly exceeds the regulatory standards, which are outdated and no longer provide a robust minimum code.<sup>443</sup> This has also been confirmed by local authority representatives responsible for inspecting mortuaries. The Regulations have not been substantively updated since they were established, and do not reflect the extensive developments in scientific knowledge about the spread of infectious diseases and the health risk posed by dead bodies. The empowering provisions in section 120 of the Health Act 1956 allow the Regulations to impose conditions on the granting, renewal, or revoking of registration, but the Regulations have never been expanded in this way.
- 10.25 We consider that the Regulations need to be updated. They are inaccessible, no longer rigorously based on current international best practice, and less than ideally suited to modern conditions. The Ministry of Health is planning to update the Regulations as part of the review of regulations under the Health Act 1956, once the Public Health Bill 2008 is enacted.

437 Section 42. This must be done within three working days after the disposal of the body concerned (s 48).

438 See s 46F. The Act was amended to include this section together with the definition of “funeral director” in 2009. Before these amendments, there was no mention of the “funeral director” in the Act.

439 Health (Burial) Regulations 1947, reg 4.

440 Defined in the Health (Burial) Regulations 1947 as “a room regularly used or intended to be regularly used for the preparation of dead bodies for burial or for the embalming of dead bodies or the examination or treatment of dead bodies prior to burial”.

441 See Health (Burial) Regulations 1947, reg 21.

442 Phone interviews with local authorities undertaken by the Law Commission (December 2012–February 2013).

443 Funeral Directors Survey, above n 422.

Therefore, we do not make any further comment other than to note that in survey feedback to us, funeral directors consider the following amendments would be particularly useful:<sup>444</sup>

- providing a list of infectious diseases that pose a health risk in the handling of dead bodies and the proper response, based on the particular risks of the disease;
- requiring that information about infectious diseases be conveyed to the funeral director at the time the body is collected;
- providing more up-to-date standards for mortuaries. For example, the current requirement to provide “a suitable sink for the cleansing of appliances” could be replaced with a requirement to install suitable sterilisation equipment; and
- providing standards for the transportation of dead bodies within New Zealand.

10.26 In chapter 12 we consider whether the existing provision for registration or licensing of funeral directors could be better utilised.

### Generally applicable law

10.27 The law of contract and general consumer protection laws such as the Fair Trading Act 1986 and the Consumer Guarantees Act 1993 apply to funeral services. Included in these is a duty to exercise reasonable care and skill,<sup>445</sup> and a duty not to make false or misleading representations or engage in false or misleading conduct.<sup>446</sup> Goods and services must be fit for purpose.<sup>447</sup> Providers of goods and services must not charge more than an agreed price,<sup>448</sup> and must use reasonable care and skill when providing an estimate of costs.<sup>449</sup> Case law has established that where special skill or expertise is required to deliver the service, the person supplying the service will be judged against the standard of a person possessing the special skill or expertise.<sup>450</sup> This means that a person acting to the best of their ability will not meet the standard if their abilities are lacking.<sup>451</sup>

10.28 Competition law is also relevant to the functioning of the funeral sector. Of particular pertinence to consumer interests are the provisions on restrictive trade practices under the Commerce Act 1986, which prohibit arrangements that substantively lessen competition in a market.<sup>452</sup>

10.29 General health and safety legislation also applies, including the Health Act 1956, the Health and Safety in Employment Act 1992, and the Health (Infectious and Notifiable Diseases) Regulations 1966.<sup>453</sup> The Ministry of Health has also prepared guidance for managing the health risks associated with handling dead bodies.<sup>454</sup>

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444 Funeral Directors Survey above n 422.

445 Consumer Guarantees Act 1993, s 28.

446 Fair Trading Act 1986, ss 9, 10, 11 and 13.

447 Consumer Guarantees Act 1993, s 8.

448 Section 11.

449 Section 28.

450 *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, approved in *Chin Keow v Government of Malaysia* [1967] 1 WLR 813 (PC); *Bolitho v City and Hackney Health Authority* [1998] AC 232, [1997] 4 All ER 771 (HL); *Jung v Templeton* [2010] 2 NZLR 255 (HC) at [24]–[25], affirming *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 at 737.

451 It is not clear how this would be applied to an industry in which there are no mandatory training requirements.

452 Commerce Act 1986, s 27.

453 The Health and Safety in Employment Act 1992 imposes obligations on those in charge of places of work, while the Health Act 1956 addresses more general matters of public health.

454 Ministry of Health *Environmental Health Protection Manual* (June 2004). While not publicly available, relevant parts of the Manual are distributed to funeral directors by health protection officers.

- 10.30 Some services relating to the deceased are subject to additional restrictions – for example, the Hazardous Substances and New Organisms Act 1996 applies to the handling of embalming fluid. Financial services law, securities law, and insurance law apply to associated financial products such as prepaid funerals and funeral insurance. These areas of law are outside the scope of this review.

## INDUSTRY ORGANISATIONS

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- 10.31 Industry organisations play a significant role in the funeral services sector, although membership of these organisations is voluntary. The Funeral Directors Association of New Zealand (FDANZ) is the largest industry organisation, and has existed since 1937.<sup>455</sup> Other organisations are also relevant, and, in particular, the New Zealand Embalmers Association (NZEA) has a distinct but complementary role to that of FDANZ, focusing on training and professional support for embalmers. More recently, New Zealand Independent Funeral Homes Ltd (NZIFH) was formed as an alternative industry voice, specifically representing New Zealand-owned, family-operated funeral homes. Most funeral directors associated with NZIFH remain members of FDANZ as well, although some chose to affiliate only with NZIFH.<sup>456</sup>
- 10.32 A primary role of FDANZ is the establishment and enforcement of a professional code of conduct.<sup>457</sup> This code includes the requirement for all members to have a nationally recognised qualification. Other minimum standards also apply, such as a three-yearly inspection of premises. New members must demonstrate that they comply with FDANZ's standards and criteria, and meet continuing education requirements. Members receive a practising certificate, and FDANZ provides for a complaints resolution process to enforce its code of conduct. NZEA also issues practising certificates to qualified embalmers, provided continuing education requirements are met. NZEA has a separate code of conduct, but no separate complaints service. Instead, FDANZ also reviews complaints about embalming, but we have been told that these are particularly rare.
- 10.33 FDANZ has advised us that very few complaints are received each year, and these are mostly resolved at the earliest stage of the complaints process.<sup>458</sup> In 2012, FDANZ received seven complaints, of which five were resolved informally and two progressed to the formal dispute resolution process.
- 10.34 When a complaint is first received, FDANZ will encourage the aggrieved party to write a letter detailing the complaint and to visit the funeral director together with a support person to see if it can be resolved informally. Usually this is the end of the matter. If the complaint is not resolved, the aggrieved party will then write a formal letter of complaint to FDANZ and agree to be bound by FDANZ processes. The funeral director then has an opportunity to respond to the complaint in writing. The person complaining will occasionally respond to new matters raised.
- 10.35 The written materials are given to a complaints committee, comprising two members of the executive of FDANZ. They will issue their decision on whether there has been a breach of the FDANZ code of ethics based on the written material, and will also determine the appropriate

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455 Originally under the name “New Zealand Federation of Funeral Directors”: see < [www.funeralsnewzealand.co.nz](http://www.funeralsnewzealand.co.nz) > .

456 We note that FDANZ has informed us that some funeral directors affiliated with NZIFH were formerly members of FDANZ, but resigned membership after an adverse complaints decision.

457 The functions of the Association are:

- To be the pre-eminent voice and standard setter for funeral service in New Zealand;
- To promote quality, expertise, and integrity in the funeral profession by its members in New Zealand;
- To promote, control and regulate the funeral profession by its members in New Zealand;
- To promote the training, education, and examination of persons practising, or intending to practice, the funeral profession in New Zealand.

458 Telephone call with Robin Grooby, FDANZ Executive Officer (5 December 2012).

- sanction. This decision can be appealed within 60 days. The appeal is heard by an independent third party, generally a Disputes Tribunal referee acting as an independent arbitrator.
- 10.36 If FDANZ finds that the funeral director has breached the code of ethics, the sanctions range from requiring an apology, to a full or partial refund, compensation, training, or suspension of the practising certificate. An FDANZ member can also lay a complaint against another FDANZ member considered to be breaching the code or calling the organisation into disrepute. However, FDANZ considers that it is unable to review complaints about prices, because doing so could be construed as an attempt to determine prices across the industry and may be seen as a breach of section 30 of the Commerce Act 1986.
- 10.37 FDANZ has informed us that a major concern for its organisation is that in the absence of compulsory affiliation, the code of conduct has limited effectiveness. We have been informed that each year, several calls are received from bereaved families who are dissatisfied with the service of non-member funeral directors. A related concern is that the voluntary nature of their organisation undermines the efficacy of disciplinary proceedings, because members subject to an adverse finding may simply leave the organisation.
- 10.38 Indeed, the percentage of operational funeral homes that are members of FDANZ has dropped significantly over the past 10 years. This could suggest either that some funeral directors (especially new providers) are deciding the benefits of membership are not worth the costs, or that fewer funeral homes meet FDANZ standards; or a combination of these factors. In 2003, around 80 per cent of funeral directors were affiliated with FDANZ. That figure is now closer to 60 per cent. However, FDANZ has informed us that most of the unaffiliated funeral directors are low-volume service providers, and approximately 85 per cent of funerals are conducted by a FDANZ funeral home.<sup>459</sup>
- 10.39 Both FDANZ and NZEA have repeatedly called for mandatory standards for the sector. In 2003, NZEA submitted that embalmers should be regulated under the Health Practitioners Competence Assurance Bill, but the Select Committee did not recommend their inclusion. We understand that this is because embalming does not treat a medical condition. In a submission on our 2011 Issues Paper on death certification, FDANZ expressed the view that funeral homes should be required to have at least one member of staff with a qualification in funeral directing, and that no one should be permitted to embalm a body without a formal qualification.
- 10.40 As with any voluntary self-regulation, the existence of an industry body such as FDANZ creates a two-tier industry: one that is unregulated, and one that is subject to standards of service developed by the industry. While anyone may be a funeral director, achieving affiliation with FDANZ requires certain standards to be met. New providers may struggle to demonstrate that they have high standards without becoming affiliated with FDANZ. This is likely to be a particular issue for providers of natural funeral services, as FDANZ's standards are focused on traditional full-service funeral directors.
- 10.41 Conversely, a drop in membership potentially makes it difficult for consumers to distinguish between experienced and reputable funeral directors who choose not to be affiliated with FDANZ, and funeral directors who do not meet FDANZ's standards. We have spoken to several funeral directors from NZIFH who meet FDANZ's membership criteria but have chosen not to join. These funeral directors considered that there were insufficient benefits of membership, and that FDANZ membership did not provide a significant marketing advantage.

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459 FDANZ has also informed us that it is aware of several new providers that are not eligible for membership because they have unqualified staff or inadequate facilities.

## INDUSTRY TRAINING

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- 10.42 Training of funeral directors and embalmers is made available via an industry training organisation<sup>460</sup> known as the Funeral Services Training Trust (FSTT). Currently two trustees of the FSTT are representatives of the FDANZ, and two are representatives of the NZEA.<sup>461</sup> The FSTT offers a Diploma in Embalming and a Diploma in Funeral Directing and registers assessors for those diplomas. The training combines on-the-job learning with modular courses taught at the Wellington Institute of Technology (WelTec). The New Zealand Qualifications Authority reviews the external moderation process annually. Students will not be accepted for these courses unless they already have a year's experience working in a funeral home and are able to nominate an approved supervisor. The FSTT also promotes ongoing training for funeral directors and embalmers, and oversees the continuing education requirements for practising certificates issued by NZEA and FDANZ.
- 10.43 We note there are concerns that the existing training structure is relatively inflexible, and does not provide a clear pathway into funeral directing for those not already employed in the industry. However, it is not within the scope of this project to assess whether a different training structure should be adopted.
- 10.44 Training is not mandatory and it is possible to establish a funeral home and act as a funeral director without having completed the Diploma in Funeral Directing or any informal practical training. As discussed in more detail in the next chapter, some funeral directors are concerned that this can result in low standards.

## SUMMARY

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- 10.45 In this section, we have provided a brief overview of the way in which funeral and bereavement services are currently provided in New Zealand. The situation is characterised by the central role of the private funeral director and, at the same time, an increasingly diverse sector. The traditional “family run” funeral homes remain key players in the industry, although many have either significantly expanded the services offered, or have been bought out by companies that own multiple funeral homes. A small number of new providers are also looking to offer a more “natural” approach to caring for the deceased, and there is a small but resurgent interest in family-led funeral arrangements. The FDANZ continues to play a key role, but has seen a drop in membership in recent years. In the next section, we consider the public health and consumer interests at play in this changing market.

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<sup>460</sup> Industry Training Organisations define national skills standards for various industries and manage the training and assessment of trainees in that industry. They are managed by industry representatives, but must be accredited with the New Zealand Qualifications Authority. They were established under the Industry Training Act 1992 to formalise apprenticeships in New Zealand.

<sup>461</sup> For more information see < [www.fstt.org.nz](http://www.fstt.org.nz) > .

# Chapter 11

## A unique market for services

### INTRODUCTION

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- 11.1 In this chapter we consider the public interests and policy objectives relevant to the funeral services sector. In particular, we consider whether there is a case for additional consumer protection measures based on the nature of this purchase.
- 11.2 The funeral sector in New Zealand has never been tightly regulated. There have been repeated calls for regulation by both the Funeral Directors Association of New Zealand (FDANZ) and the New Zealand Embalmers Association (NZEA), but these have not been accepted.<sup>462</sup>
- 11.3 We consider that the following policy goals and public interests are of central relevance to this discussion:
- access to affordable and dignified funeral services;
  - protection of public health and avoidance of offence; and
  - according appropriate dignity to the deceased through the respectful handling of dead bodies, including cultural appropriateness.
- 11.4 We begin this chapter by exploring these public interests. We then discuss the nature of the market for funeral services. In chapter 12, we draw on this discussion in presenting preliminary options for reform.

### PUBLIC INTERESTS AND POLICY OBJECTIVES

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- 11.5 As discussed in chapter 5, there is a public interest in ensuring that everyone has access to a proper funeral, which has long been recognised. This interest captures concerns about public health, and respect and propriety towards the dead.
- 11.6 The current law and administrative practice acknowledges that someone must bear responsibility for dignified disposal. Therefore, if the deceased's own loved ones are absent or lack the resources, this task falls to society at large – administered by either central government, as through the means tested funeral grant available from Work and Income New Zealand, or by local government through the provision of burial space or cremation facilities.<sup>463</sup> These measures affirm the continued societal importance of ensuring the dead are disposed of promptly and respectfully, and the bereaved are able to access a dignified funeral for their loved ones without being subject to financial distress.
- 11.7 In times gone by, dead bodies were often viewed as a potential threat and a source of contamination. It is now known that the organic process of bodily decay poses few health risks

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<sup>462</sup> FDANZ has informed us that it first sought compulsory registration of funeral directors in 1937, while operating as the New Zealand Federation of Funeral Directors. As mentioned above, the Health (Burial) Regulations 1946 contain a registration requirement, but this falls short of what was called for. Further calls for increased regulation have been made since this time, but other than an update of the regulations in the 1980s (which did not introduce significant changes), this lobbying has not met with success. See also C Schafer “Dead serious? Funeral directing in New Zealand” (2008) 4 Sites: A Journal of Social Anthropology and Cultural Studies 95 at 100–101.

<sup>463</sup> Discussed above in ch 5 at [5.9].

provided basic hygiene precautions are taken.<sup>464</sup> There are, however, particular risks arising when the deceased had an infectious disease. The extent of these risks and the appropriate mitigation measures will depend on the nature of the disease, including whether it is transmissible by body fluids or by airborne pathogens.<sup>465</sup> There is clearly a public interest in ensuring that dead bodies are handled in such a way that any health risks are minimised. There is also an interest in avoiding offence occasioned by the inevitable effects of bodily decay and minimising or limiting further family trauma.

- 11.8 As discussed in chapter 1, ensuring that the deceased is treated in a culturally appropriate manner, and that the family of the deceased are able to perform any necessary religious or other rituals, is in the general public interest. For example, most Māori and Pākehā New Zealanders are embalmed so that the body can be laid out at a marae or private home for a longer period of time without beginning to decay, and to allow for an open casket. This is a particularly common feature of the tangihanga, of which the display of the tūpāpaku for a final farewell is an integral part. In contrast, the religious laws of Islam, Hinduism, Judaism, and Sikhism all consider embalming to be disrespectful and fundamentally inconstant with ritual requirements. As New Zealand becomes increasingly multicultural and pluralistic, we expect different sectors of the community will have increasingly diverse views about what constitutes respectful handling of the dead. It is important that the legal framework provides for these different approaches.
- 11.9 The public interest in a dignified funeral requires us to consider standards of service, affordability, and the position of the consumer. The person or people purchasing funeral services will almost always be the family or close friends of the deceased. Decisions about funerals are usually made in times of high stress, and often without any prior experience. These factors may suggest that the consumer protection interest is higher in relation to funeral services than many other services, an issue that we discuss further in the next section.

## A MARKET WITH UNIQUE CHARACTERISTICS

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- 11.10 Death and dying are inherently sensitive subjects, and grieving families are inherently vulnerable consumers. When a death occurs suddenly, there will be little time to consider funeral options before decisions need to be made. And even when a death is expected, many families are likely to be reluctant to begin enquiries about funeral arrangements until the death occurs.<sup>466</sup>
- 11.11 Several features of the market combine to suggest that existing regulation may not be adequate. These include the practical difficulty of arranging a funeral without a funeral director, creating a captive market for services; the lack of competition for services in rural areas; the importance of high standards of service for the mourning needs of the bereaved; the time pressures involved for such a large financial and emotional commitment; and the inherent information asymmetries faced by the consumer.

### Constraints on consumer choice

- 11.12 While it is perfectly legal to arrange a funeral without a funeral director, it is not straightforward in practice. Most people are ill-equipped to prepare and store the deceased before disposal, and cemeteries and crematoria prefer not to deal directly with the deceased's family. Few coffin manufacturers sell directly to the public, especially at short notice. Using a

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464 O Morgan "Infectious disease risks from dead bodies following natural disasters" (2004) 15 *Revista Panamericana de Salud Pública* 307.

465 KS Creely *Infection risks and embalming* (Institute of Occupational Medicine, 2004); and Susan Salter Davidson and William H Benjamin "Risk of infection and tracking of work-related infectious diseases in the funeral industry" (2006) 34 *AJIC* 655.

466 R McManus and C Schafer *Final Arrangements: Attitudes to Funeral Costs in New Zealand* (University of Canterbury, 2009) at 51–53.

funeral director is such a widespread social practice that independently arranging the funeral may also be socially proscribed.

- 11.13 In many parts of New Zealand, there may only be one funeral director within easy driving distance. Rural funeral directors have confirmed to us that they commonly advertise their services across several districts, but most people end up using the closest available funeral director. Even in major centres, FDANZ has informed us that geographical proximity appears to be a major factor in choosing a funeral director, and it is rare for bereaved families to ask for testimonials or otherwise attempt to assess whether previous customers have been satisfied with the service provided.

### Emotional and financial significance of purchase

- 11.14 The social importance of funerals is widely acknowledged.<sup>467</sup> The funeral is the last occasion at which the deceased is physically present, and its central purpose is to enable grief to be shared, and the deceased to be farewelled. The bereaved family is likely to be heavily reliant on the professional service provider to create a funeral that meets their needs and expectations. Those purchasing funeral services may also be struggling to come to terms with their grief, or may be affected by conflicted emotions that make decisions more challenging.
- 11.15 In addition to these considerations is the factor of price. Funerals present a significant one-off expenditure that can be unexpected and difficult to budget for. A report by Consumer Magazine in 2009 found that the average total funeral-related expense is \$8,800.<sup>468</sup> This includes the costs and disbursements paid to the funeral director, cremation and/or a cemetery plot, and a headstone, if any. It was estimated that around half this cost is the funeral director's fee, and 20 per cent the cost of the coffin. The remaining 30 per cent is the cost of burial or cremation. Our research also suggests that the cheapest available funeral option in most areas would be around \$2,000 to \$3,000 for what is sometimes termed "direct disposal".<sup>469</sup> Unlike most major purchases, there are significant time pressures involved – a point which has been made repeatedly by those calling for greater regulation of the sector:<sup>470</sup>

Impulse buying, which should ordinarily be avoided, is here a built-in necessity. The convenient equivocations of commerce — "I'll look around a little, and let you know," "Maybe, I'll call you in a couple of weeks if I decide to take it" — simply do not apply in this situation.

- 11.16 A funeral grant of \$1,959 is available from Work and Income New Zealand, and is means-tested based both on the assets of the deceased and the income of the applicant survivor.<sup>471</sup> In the 2011/2012 financial year, of the 30,080 people who died in New Zealand, 5,473 grants were paid.<sup>472</sup> The Act also makes provision for "burial or cremation of poor persons", providing that the local authority having the control and management of a cemetery or crematorium *may* permit the burial or cremation of "any poor person" free of charge or, on the signed order of a justice of the peace, *must* permit their burial.<sup>473</sup> In practice, it appears that this provision not often used, as it has effectively been superseded by the Work and Income grant. However, there is a significant shortfall between the maximum grant payable and the cost of a basic funeral including burial or cremation.

467 See for example Ivan Emke "Therapy, Legitimation Or Both: Funeral Directors and the Grief Process" (paper presented to the Association for Death Education and Counselling conference, Cincinnati, Ohio, March 2003).

468 Consumer NZ "Funeral costs" (17 August 2009) < [www.consumer.co.nz](http://www.consumer.co.nz) > .

469 This involves cremation in a low-cost casket, and either a very brief funeral service (such as the use of an on-site chapel for half an hour), or no funeral service. Some funeral directors advertise this as a low-cost option; others will provide it but only on request.

470 Jessica Mitford "The Undertaker's Racket" *The Atlantic* (Boston, MA, 1 June 1963).

471 Work and Income "Funeral Grant" < [www.workandincome.govt.nz](http://www.workandincome.govt.nz) > .

472 Rob Stock "Are we too poor to die?" *Stuff* (New Zealand, 6 May 2012) < [www.stuff.co.nz](http://www.stuff.co.nz) > .

473 Burial and Cremation Act 1964, s 49.

## Consumer expectations and suitability of redress

- 11.17 With increasing life expectancies and smaller family and community structures in many sectors of society, members of the public are likely to have less direct involvement with death. It follows that there will be less general knowledge about funeral practices. At the same time, the significance of funerals suggests that consumer protection is particularly important in this area. This gives rise to two issues. First, there appears to a mismatch between public expectations of industry standards and oversight, and the reality. Second, due to the nature of the purchase, the framework of the Consumer Guarantees Act 1993 applies somewhat clumsily to this form of service.
- 11.18 FDANZ has informed us that they receive several calls each year from people wishing to lay a complaint against a funeral director, only to discover that the funeral director was not a member of FDANZ. Their impression is that most people assume the industry is subject to mandatory oversight, and assume that the FDANZ has disciplinary authority over all funeral directors. Members of FDANZ and New Zealand Independent Funeral Homes Ltd (NZIFH) have also told us that people are often surprised to learn that there is no requirement for funeral directors and embalmers to be qualified.
- 11.19 Several members of FDANZ and NZIFH have told us that they have at times been required to take over the organisation of a funeral and preparation of a body at short notice after the deceased's family initially contracted with an inexperienced service provider. Often the family was not aware that the provider lacked qualifications. In some instances, embalming had been attempted without sufficient knowledge of proper processes, requiring extensive remedial work to achieve a presentable appearance for an open casket.
- 11.20 Information about standards of service is difficult to come by. Larger countries tend to have more robust systems of consumer-to-consumer feedback, by virtue of their size. In contrast, many districts in New Zealand can sustain only one or at most two funeral directors<sup>474</sup> and, as mentioned above, declining levels of industry affiliation also make it difficult for consumers to assess standards of service. In addition, consumers may not realise that levels of experience and qualifications vary significantly within this sector, so may not enquire about standards.
- 11.21 Funeral directors have informed us that bereaved families rely on the funeral director to provide information about the preparation of the body, legal requirements, and the conduct of the funeral more generally. They therefore depend on the funeral director providing accurate information. We have been informed that most complaints arise from poor communication, including when the funeral director fails to properly understand and respond to the family's preferences.
- 11.22 This appears to have been the situation in one case publicised last year under the headline "Natural Burial Traumatizes Family"<sup>475</sup>. The mother of the deceased refused to pay for funeral services that she considered were substandard, and the funeral provider brought proceedings in the Disputes Tribunal. The decision recorded that:<sup>476</sup>

The body leakage is an example of where insufficient information was provided to family and friends. To be practically and emotionally prepared the family and friends needed more than an explanation of what could be possible. In particular, there was not enough information about the amount of leakage

474 In 2011, 19 districts had fewer than 100 deaths, and a further 12 districts had between 100 and 200 deaths. See Statistics New Zealand "Local Population Trends" < [www.stats.govt.nz](http://www.stats.govt.nz) > .

475 Sarah Young "Natural Burial Traumatizes Family" *Stuff* (New Zealand, 7 February 2012) < [www.stuff.co.nz](http://www.stuff.co.nz) > .

476 *Living Legacies v Deidre Stansbury* Disputes Tribunal Nelson CIV-2011-042-000366, 31 October 2011.

possible and the traumatic effect it could have on people, particularly children, and how to deal with this. I find the family had genuine concerns here and suffered unnecessary trauma.

- 11.23 This demonstrates the importance of providing reliable and impartial information. Initial preferences may change when the implications are more fully explained. Some families may prefer to embalm once informed of the possibility of odour and leakage; other families may prefer not to embalm once informed that a body can be kept presentable using ice-packs and refrigeration for the first few days after death.
- 11.24 Under section 32 of the Consumer Guarantees Act, if a failure to provide reasonable service cannot be remedied and the contract is not cancelled, the consumer may “obtain from the supplier damages in compensation for any reduction in value of the product of a service below the charge paid or payable by the consumer for the service.” Existing consumer protection law rests on the premise that poor service is occasionally inevitable but can be remedied. This is not an accurate assumption for the funeral sector. Poor service is likely to cause significant emotional distress, and there is very little scope for it to be corrected. While reduced fees may go some way to ameliorating distress occasioned by poor service, it is clearly not likely to be an adequate substitute for receiving good service at the outset.

### Information asymmetries: pricing

- 11.25 As mentioned above, the lack of general public knowledge about funeral practices is a defining feature of the sector. Individuals are unlikely to seek this information until they need it urgently, by which point it is difficult to assess the options available. In particular, it can be difficult for consumers to obtain accurate information about prices. Most funeral directors do not include a full price list in promotional material. Few funeral directors proactively list a full schedule of costs and disbursements online; most advertise that their prices vary depending on a range of factors, and that a quote can be provided on request.
- 11.26 In the past few years, the cost of funerals has been subject to discussions in the New Zealand media.<sup>477</sup> However, it is important to note that concern about funeral prices is not a new phenomenon.<sup>478</sup> For as long as people have been paying for funeral services, there have been periodic concerns that prices are too high, often accompanied by anxiety that unscrupulous businesses are fleecing vulnerable families.<sup>479</sup> While prices may seem high, the cost of a New Zealand funeral is roughly comparable to those charged in other countries with similar approaches to death and mourning.<sup>480</sup>

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477 Stock, above n 472.

478 This can be traced back at least to 1843, when Edwin Chadwick published a powerful critique of British undertakers, arguing that:

The circumstances of the death do not admit of any effective competition or any precedent examination of the charges of different undertakers, or any comparison and consideration of their supplies; there is no time to change them for others that are less expensive, and more in conformity to the taste and circumstance of the parties.

...

If there be any sort of service, which principles of civic polity, and motives of ordinary benevolence and charity, require to be placed under public regulation, for the protection of the private individual who is helpless, it is surely, this, at the time of extreme misery and helplessness of the means of decent interment.

Edwin Chadwick, *Report on the Sanitary Conditions of the Labouring Population of Great Britain: A Supplementary Report on the Results of a Special Inquiry Into the Practice of Interment in Towns Made at the Request of Her Majesty's Principal Secretary of State for the Home Department* (W Clowes and Sons, 1843) at 51–53.

479 An article in *The Press* in 1904 decried the lack of price competition among undertakers, and suggested that if the prices were not made more reasonable, the conduct of funerals should be placed in the hands of municipalities, so that “the surviving relatives would know exactly what they had to pay, and there would be no suspicion that they were being preyed upon by an unscrupulous tradesman ready ever to take advantage of their grief.” “Undertakers’ Charges” *The Press* (Christchurch, Volume LXI, Issue 11828, 27 February 1904, at 6) < [www.paperspast.natlib.govt.nz](http://www.paperspast.natlib.govt.nz) > .

480 In Australia, the average funeral costs between AUD 4,000 and AUD 7,000 (see [Choice.com.au](http://Choice.com.au) “Funeral Costs” (9 February 2011) < [www.choice.com.au](http://www.choice.com.au) > ). In the United States, the average cost is USD 6,560 (see National Funeral Directors Association “Trends and Statistics” (12 April 2013) < [www.nfda.org](http://www.nfda.org) > ). A basic funeral in Britain costs £3,284 while the total expenses relating to death are £7,114 (see Sunlife Direct “Cost of Dying Report 2012” (2012) < [www.sunlife.co.uk](http://www.sunlife.co.uk) > at 8 and 10). It should be noted that concerns about funeral costs appear to be prevalent in these countries also.

- 11.27 Many commentators have argued that the circumstances surrounding death, including the vulnerability of the bereaved and the difficulty of comparing different providers, require special measures for consumer protection. However, some also argue that the persistency of concerns around pricing reflects an underlying ambivalence about paying for such an intimate service, or a general suspicion of the nature of the work.<sup>481</sup>
- 11.28 A recent academic study notes that “the fear of the cost of funerals remains an active concern and a real threat for many people today.”<sup>482</sup> The study held focus groups with people who had recently been involved in organising the funeral of a close friend or family member. Participants were found to view funeral directors as the “key site for negotiating cost” and “responsible for managing the options people have”. One participant is recorded as saying:<sup>483</sup>
- It goes back to the Funeral Directors too though. They are sitting there opposite you, and they are saying you can have this, this and this, and at this cost you can have this and if you really want you could have this. And once again you are in this frame of mind where you are thinking, ok, yeah looks wonderful, and you know you are overwhelmed with all your feelings and you are just saying yes, yes, yes. So I think a lot of it is on the Funeral Directors, I mean you know they did an awesome job with us, but I think they have got a responsibility and I don’t know who monitors them or keeps an eye on them or whatever happens, but they have got a responsibility to tell people that you don’t have to have a \$3000 coffin, you can have a \$1600, one which will do the same job and not make you so bad about saying, well actually I want the cheapest one there is.
- 11.29 In our view, the longstanding nature of pricing concerns suggests that it is too simplistic to ask whether funerals are “too expensive”. The more pertinent issue is whether purchasers of funeral services have access to information necessary to make informed choices, or whether they are at an informational disadvantage. Consumer disadvantage is an enduring perception, but is it accurate of New Zealand today?
- 11.30 In the above-mentioned study on funeral costs, the authors concluded that the real issue is the “lack of knowledge, misconceptions, inconsistencies and misinformation about rudimentary funeral organisation.” This includes misunderstandings around the role of the funeral director, extending to a “prevailing assumption that you have to use a funeral director and that they are always really expensive.” The authors’ research suggests, conversely, that many funeral directors are “very willing to negotiate the services they offer.”<sup>484</sup>
- 11.31 Some funeral directors have told us that bereaved families are uncomfortable talking about expense; others have said that families will at times avoid the lower-cost options available because of the importance placed on a proper final farewell. There is a tension between not wanting to spend too much, and wanting to “do everything right”. FDANZ considers that funeral directors have a role in assisting families to make the best decisions for their circumstances, including avoiding unnecessary costs. At the same time, funeral directors with whom we have consulted also note that there can be unrealistic expectations about what can be provided for a given cost.
- 11.32 New Zealand consumer protection law operates on the assumption that consumers are best placed to protect their own interests, provided they have access to reliable information and the market is functioning effectively.<sup>485</sup> Providers of goods and services are prohibited from

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481 McManus and Schafer, *Final Arrangements*, above n 466, at 74.

482 At 9. However, this study goes on to state that “The moral opprobrium toward funeral directors in the literature is an insufficient account of the complexity of people’s attitudes to and negotiations with funeral directors, family and the state.”

483 At 62.

484 At 72.

485 Bill Bevan, Bob Dugan and Virginia Grainer *Consumer Law* (LexisNexis, Wellington, 2009) at [3.7.2]–[3.7.3].

misleading consumers<sup>486</sup> or engaging in uncompetitive conduct,<sup>487</sup> but the law does not go so far as to protect the interests of a consumer who fails to negotiate a good price. Rather, it is assumed that consumers have sufficient bargaining power to protect their own interests. Yet this assumption may be questionable if consumers in a given market are at a significant information disadvantage, as a lack of information will make it more difficult for consumers to make the choices that meet their needs; or if they are vulnerable for other reasons. As discussed above, there is some evidence that this is the situation in the funeral sector.

## PRELIMINARY OBSERVATIONS

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- 11.33 In the course of research, we have been alerted to some structural issues in the funeral sector, which may suggest this market has some attributes that call for a targeted regulatory response. In particular, there is some evidence that the lack of controls around standards does not meet public expectations, and that it is difficult for consumers to assess the quality of goods and services to be provided in this sector. Consumers may also struggle to compare prices if these are not itemised in promotional materials.
- 11.34 The nature of the market and the purchase also makes it difficult to compare different providers ahead of purchase, and there appears to be a common sentiment that it is not reasonable to expect bereaved families to do extensive research about different service providers. We seek submissions from those with experience in the sector, both as providers and consumers, to give us a more complete picture of current practice.
- 11.35 We also acknowledge that many people consider a relative lack of regulation is a positive feature of New Zealand's funeral sector.<sup>488</sup> It allows for a wide range of culturally sensitive approaches to dealing with the deceased, and it avoids imposing barriers to entry. For example, the entry into the market of alternative funeral directors providing natural preparation or facilitated home funerals would be more difficult if funeral service providers were required to have embalming qualifications.
- 11.36 We have therefore developed reform options that seek to address the particular features of this market, and better equip consumers to make the choices that meet their needs. In chapter 12, we present options that have been designed to retain a high level of flexibility and openness in the sector, while providing increased transparency and consumer protection. We will also consider the advantages and disadvantages of various options for regulatory intervention and the extent to which these options are suitable for the particular market conditions identified.

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486 Fair Trading Act 1986, ss 9–14.

487 Commerce Act 1986, pts 2 and 3.

488 See for example Sally Raudon: Contemporary funerals and mourning practices: An investigation of five secular countries" (paper reporting on research undertaken with the support of a 2010 Churchill Fellowship, New Zealand, December 2011). We also received a submission from Sally Raudon on our earlier Issues Paper in which she states:

New Zealanders benefit greatly from the country's light regulatory environment around death and body disposal, because it gives them great flexibility in the care and rituals they wish to use with their loved one. In each of the countries I visited, the New Zealand practice of minimising bureaucracy's intrusion into death was seen as admirable.

Submission from Sally Raudon (1 July 2011) on Law Commission *Final Words: Death and Cremation Certification in New Zealand* (NZLC IP23, 2011).

# Chapter 12

## Improving consumer protection in the funeral sector

### INTRODUCTION

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- 12.1 The previous chapter discussed the nature of the market for funeral services and the issues that may arise as a result of market factors. In this chapter, we present three possible options for reform and discuss the advantages and disadvantages of each option. These options are intended to complement the existing framework, and have been tailored to address structural features of this market without introducing new measures that are overly interventionist or unduly restrictive on funeral service providers. We seek a funeral sector that is flexible and responsive to consumer preferences, with consistently high standards.
- 12.2 Based on this underlying principle, we put forward three options for improved oversight of the sector. The first is to introduce new pricing and services disclosure provisions for the benefit of consumers. The second is to require funeral service providers to be licensed by local authorities. The third option would require providers to be bound by a code of ethics enforced by an industry complaints body.
- 12.3 These reform options are intended to respond to the issues identified in the preceding chapters. In particular, our proposal for increased transparency arises from our evaluation of the unique characteristics of this market, and the difficulties for the bereaved in obtaining information because of the time pressures involved. We do not suggest that there is a significant problem of funeral directors taking advantage of consumers; rather, we suggest that this is a market in which asymmetries of information are particularly problematic, and that this could be addressed through increased disclosure. In the absence of widespread voluntary disclosure, mandatory requirements may be justified. We encourage submissions from the general public and the funeral sector to enable us to better assess the functioning of this market and, in particular, whether increased pricing transparency is needed.
- 12.4 We note that the proposed options vary in the level of additional obligations, providing a graduated response to the issues. For example, requiring additional disclosure is a light-handed intervention, while licensing would provide more significant additional consumer protection. Retaining the status quo as described in chapter 10 also remains an option.

#### **Option 1: Increased transparency**

- 12.5 Option 1 would require providers of funeral services to disclose specific information about pricing and other features of the service provided. This is intended to better facilitate consumer choice, and enable purchasers of funeral services to protect their own interests. Disclosure obligations are a feature of other sectors and are used to improve transparency and address information asymmetries present in a market. This option represents a relatively light-handed measure.

### Option 2: Licensing of funeral service providers by local authorities

- 12.6 Option 2 would build on the existing registration requirements to establish mandatory licensing of funeral service providers by local authority health inspectors. This is intended to protect public health and consumer interests through providing a minimum standard of service provision, based on knowledge of health matters and legal requirements. Offering funeral services to the public for a fee without a licence would become an infringement offence.

### Option 3: Industry complaints authority

- 12.7 Option 3 would require licensed funeral service providers to accept the jurisdiction of an industry complaints body that provides a code of ethics and a complaints mechanism for a breach of this code. One possibility is to establish a new industry body, possibly with consumer representatives. Another possibility is to provide an approvals process for existing industry bodies, and any new industry bodies seeking to become established.
- 12.8 These options are not mutually exclusive and any reform could be based on any combination of them. Our current preferred approach would be to combine increased transparency with licensing of providers by local authorities (options 1 and 2). We consider that this combination would promote improved standards of service and ensure adequate protection of public health and consumer interests, without imposing unwarranted additional costs on either the funeral services sector or local authorities (although we acknowledge that this approach is not without cost implications).
- 12.9 We have considered whether additional reforms specifically directed at embalming are required. In particular, the New Zealand Embalmers Association has repeatedly called for mandatory qualifications of embalmers. However, at this stage we think that there is insufficient justification for this reform. We are concerned that the regulatory framework needed to enforce this requirement would present costs that outweigh the likely benefits, especially regarding enforcement.

## WHO WOULD BE SUBJECT TO THE PROPOSED REFORMS?

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- 12.10 Given the changing sector, we think that any reforms should capture all people who are providing services relating to the handling of dead bodies to the public for a fee. This would encompass, for instance, traditional funeral directors, providers of natural funerals, those who facilitate home funerals and those who carry out embalming. These could all be defined as falling within a new legislative concept of “funeral service providers” which could be defined within the Act or in regulations.
- 12.11 We do not intend this definition to include providers of cemeteries, crematoria, or those who provide associated services not involving the direct handling of dead bodies, such as transporting the body in a casket from a chapel to a cemetery.
- 12.12 There may be some residual definitional issues regarding the overlap between “funeral service providers” and those who provide cremation services directly to the public. While the definition should not include local-authority operated crematoria operators, we consider that it should be broad enough to encompass the small number of low-cost service providers who arrange to collect the body, provide the caskets, and cremate on-site.<sup>489</sup>

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489 As discussed at [10.12]–[10.13], there is increasing overlap between providers of crematoria and providers of other funeral services.

## DETAIL OF REFORM OPTIONS

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### Option 1: Increased transparency

*What is this reform option intended to address?*

- 12.13 Chapter 10 explored the way in which consumer interests are currently protected when funeral services are purchased. Unlike similar jurisdictions, New Zealand relies on general consumer protection legislation (discussed in chapter 10) and does not have protections targeted specifically at this industry.<sup>490</sup>
- 12.14 This potential reform is focused on both pricing and standards of service and is intended to address the existing information asymmetries within the sector to enable consumers to better make the choices that meet their needs. This option has been developed to respond to the particular features of the sector that interfere with consumers making an informed purchasing decision, as discussed more fully in the previous chapter.

*What new obligations would be introduced?*

- 12.15 Under this proposal, funeral service providers would be subject to the following obligations:
- They must inform potential customers about the scope of the available services to be provided, including whether embalming can be provided on-site, whether there is an arrangement to provide embalming at an independent mortuary and whether the embalmer used is qualified.
  - They must disclose prices for separate elements of the different services offered or advertised.
  - They must disclose to potential customers the qualifications held in relation to the services provided – this would mean that unqualified persons would have to disclose that they are not qualified.
  - They must inform customers of any affiliation or lack of affiliation with an industry organisation that has a code of ethics and a complaints mechanism (or the details of the provider’s own code of ethics, if applicable).
- 12.16 Itemised prices would be required in any quote or estimate provided and in any final invoice. For example, the cost of the coffin, professional services, and embalming would need to be listed separately.
- 12.17 In addition, promotional materials listing the different services would also be required to include prices. For example, a pamphlet that lists the specifications of different coffins should also list the price of each coffin. Funeral service providers would be required to prepare an indicative general price list made available in writing to the deceased’s family or on the website of the funeral home. This would address the difficulty consumers can experience in researching available options, given the need to make decisions quickly.
- 12.18 We propose that these recommendations be implemented under section 27 of the Fair Trading Act 1986, which allows for consumer information standards to be established through regulations. Consumer information standards can be used to require disclosure of information relating to goods or services,<sup>491</sup> including pricing information.

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<sup>490</sup> As discussed at [10.20].

<sup>491</sup> While existing consumer information standards focus mainly on labelling of goods, s 27 of the Fair Trading Act 1986 is broad enough to encompass services. Consumer information standards are intended to be used in situations where consumers would otherwise face difficulties in accessing information, and we therefore consider that this regulatory tool is a “natural fit” for the funeral sector.

- 12.19 The consumer information standards would be enforced by the Commerce Commission, which has the power to investigate consumer complaints that information standards are not being met.<sup>492</sup>

### *Discussion*

- 12.20 Many jurisdictions have regulation targeted at improving competitiveness and pricing transparency within the funeral sector. This regulation is often justified by reference to particular features of the funeral sector, including the information asymmetry inherent in an urgent, one-off purchase, and the emotional stress involved for grieving families making this purchase.<sup>493</sup>
- 12.21 In 2001, the Office of Fair Trading in the United Kingdom released a report on the funeral sector. This report found that while the industry was “both caring and considerate”, it was also the case that “many people don’t know what to expect, spend little time thinking about their purchase, and quite understandably feel under pressure to sort everything out quickly.”<sup>494</sup> The report’s recommendations focused on greater transparency, particularly in relation to pricing. The report noted that even if standards of service are generally high, it is important to promote transparency to ensure that they remain so.
- 12.22 In Australia, many states have adopted legislation requiring funeral directors to provide a low-cost option.<sup>495</sup> In some areas, funeral directors are not required to provide a specific low-cost option but are required to provide information about the lowest cost option available.<sup>496</sup> The difficulty with these requirements is that they do not promote transparency across the board, and may not allow for sufficient flexibility in negotiating options that are cost effective but also meet the mourning needs of the bereaved family.
- 12.23 In the United States, funeral directors are required to provide a general price list itemising all costs.<sup>497</sup> The so-called “funeral rule” also requires unbundling of funeral services. For example, funeral directors must accept a coffin sourced elsewhere and must not charge an additional fee when doing so. The requirement for transparent pricing is said to enable consumers to better compare funeral homes and to ensure that they are not confused or misled by different pricing structures.
- 12.24 Unlike these jurisdictions, New Zealand has no consumer protection rules specifically directed at the provision of funeral services. Consumers face significant difficulties in researching the nature of services provided and the prices of different funeral options. We consider that this is in itself a problem, whether or not it is leading to poor service or uncompetitive pricing. In particular, a lack of readily available information about pricing makes it more difficult for consumers to make an informed purchase. Markets rely on adequate information flows to function efficiently.
- 12.25 We further consider that the nature of the sector means that in some respects, any issues arising are likely to be “silent problems”. A number of factors make it unlikely that consumers will complain or lobby for improvement, including the distractions of grief, the short time-frame in which decisions are made, the desire for closure for the bereaved family and friends, and

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492 Fair Trading Act 1986, s 28.

493 Discussed in the Victorian Government *National Competition Policy: Review of the Cemeteries Act 1958* (Victoria) (Department of Health, 2000) at 14.

494 Office of Fair Trading *Funerals: A report of the OFT inquiry into the funerals industry* (July 2001).

495 Funerals Act 2006 (Vic), s 20.

496 Fair Trading Amendment (Funeral Goods and Services) Regulation 2008 (NSW, reg 101D(1)). See also Fair Trading *Statutory Review of the Funeral Information Standard* (NSW Government, June 2011). < [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au) > .

497 For general information, see “The FTC Funeral Rule” < <http://www.consumer.ftc.gov/articles/0300-ftc-funeral-rule> > .

dignity for the deceased. Purchasing decisions in relation to funeral arrangements are often made in extremis, especially when a death was not anticipated. Social taboos about discussing funeral arrangements do not encourage consumers to be well informed or prepared in advance, and negotiating lower prices may be seen as disrespectful to the deceased. They are exceptional transactions from a consumer's perspective, made only occasionally in life, rather than routine transactions where consumers have clear expectations. These circumstances make it unlikely that consumers will draw attention to perceived shortcomings unless these shortcomings are egregious.

- 12.26 In addition, it is our view that the particular consumer protection interests operating in this market may justify a more proactive approach to disclosure of relevant information. The timeframes involved do not permit extensive consumer research, and the emotional state of the mourners may also affect financial judgment or negotiating power. In some areas, particularly rural areas, the small number of providers means that there is limited competition and therefore lower incentives for providers to inform the market. There is therefore a case for considering whether disclosure requirements should be introduced to correct an existing imbalance and to protect consumers.
- 12.27 We have also considered stronger measures that have been adopted in comparable jurisdictions. For example, it would be possible to require funeral service providers to allow customers to independently source items such as the coffin, catering, and memorial booklet, as in the United States. It would also be possible to set a maximum mark-up for coffins distributed by funeral service providers. However, we consider clear evidence of market distortions would be needed to justify considering such measures, given the existing restrictive trade practice provisions in the Commerce Act 1986. We therefore do not explore these further at this stage and have focused instead on transparency measures, which sit with the existing consumer protection framework.
- 12.28 To further assist consumers, we also raise the possibility of establishing a government-funded website containing information about funeral services and the handling of the deceased.<sup>498</sup> Ideally, relevant information must be easily accessible and impartial. This website could include information about consumer rights, the role of industry organisations, and the legal requirements surrounding death and bodily disposal. It could also provide explanations of the health risks involved and the precautions that should be taken when lay people prepare the dead for burial or cremation. We consider that this could help support families to make the appropriate decision for their circumstances and should create greater transparency.<sup>499</sup>

## Option 2: Licensing of funeral service providers

*What is this reform option intended to address?*

- 12.29 A minimally regulated market has the advantage of low barriers to entry, but the current system may not best protect and promote the interests of consumer protection, public health, compliance with legal requirements, and public expectations about the respectful handling of the deceased. We are particularly concerned that there appears to be a public expectation that the sector is subject to a level of oversight which is, in fact, absent.
- 12.30 Our second option would require funeral service providers to be licensed by local authority health inspectors. This would be a logical extension of existing requirements for the registration and inspection of mortuaries, and is within the general public health functions of local

498 Possibly as a joint initiative by the Ministry of Health, the Ministry of Consumer Affairs, and the Department of Internal Affairs.

499 This option is consistent with the reform suggestions identified in R McManus and C Schafer *Final Arrangements: Attitudes to Funeral Costs in New Zealand* (University of Canterbury, 2009) at 73.

authorities. This requirement would be directed primarily at ensuring all funeral service providers have an up-to-date understanding of the health risks posed by dead bodies and knowledge of the appropriate means of mitigating offence caused by bodily decomposition.

#### *What new obligations would be introduced?*

- 12.31 Under this option, an applicant for a funeral service provider's licence would be required to demonstrate understanding of the following:
- health risks associated with dead bodies and appropriate hygiene precautions, including during transportation;
  - timeframes for decay of dead bodies and means of avoiding offence occasioned by odour or leakage; and
  - legal obligations on funeral service providers and basic knowledge of the law relating to the deceased.
- 12.32 Knowledge would be demonstrated through an interview with an environmental health protection officer. The local authority would issue the licence, and would be able to recover the processing costs from applicants.
- 12.33 We also suggest that funeral service providers should be required to demonstrate that they have access to suitable premises for the preparation of the deceased and access to a suitable means of transportation. If this option were adopted, offering funeral services to the public without a licence could be established as an infringement offence under regulations, enforced by the local authority under the Summary Proceedings Act 1957.
- 12.34 We also suggest that licences should require periodic renewal. The timeframe for renewal should ensure sufficient oversight to account for changes in best practice, without requiring unnecessarily frequent applications.
- 12.35 These obligations would only apply to those who meet the definition of a "funeral service provider", as with Option 1. This definition is limited to those who provide services to the public *for a fee*. Therefore, voluntary groups that prepare the dead for burial would not be required to hold a licence. We consider that so far as reasonably possible, the law should accommodate different approaches to the handling of the deceased. The protection of religious freedoms in section 15 of the Bill of Rights Act and the protection of minority rights in section 20 also require that the framework should not unnecessarily obstruct the observance of burial practices by ethnic or religious groups. This means that any requirements directed at other matters of public interest need to be carefully considered to ensure that they do not inadvertently restrict different legitimate preferences of our diverse society. We do not consider there is sufficient public interest to justify imposing obligations on people who provide funeral services free of charge through religious groups or other community groups, and we are concerned that these obligations would be an undesirable barrier to the ability of such groups to meet their own burial needs. We invite submissions as to whether it is appropriate to distinguish between those who offer funeral services for a fee and those who undertake such services on a voluntary basis.

#### *Discussion*

- 12.36 We have received feedback from local authorities about the current registration process. All local authorities with whom we spoke confirmed that the registration of funeral directors was essentially a pro-forma exercise, and that they understand the regulations to be directed primarily at standards for premises. Several noted that they were unsure what purpose the

registration of funeral directors serves, given that there are no grounds to reject an application for registration and no sanctions for failing to register. In contrast, mortuary inspections are undertaken by environmental health officers, who check for compliance with the regulations and can require any issues to be remedied.

- 12.37 We are concerned that current oversight of public health and safety issues that arise in relation to the handling of dead bodies is insufficient because of the lack of an appropriate regulatory mechanism. We consider that licensing would afford a suitable measure of assurance, and that public health and safety is likely to be better protected if environmental health officers have a role, similar to mortuary inspections, in confirming that funeral directors have a basic understanding of the public health risks associated with handling dead bodies. This approach would provide a minimum level of external oversight.
- 12.38 Importantly, this approach does not require funeral service providers to have a formal qualification. If a candidate is able to demonstrate knowledge of the relevant issues, the local authority would be required to grant the licence. A variation to this approach would be to require a character check. Local authorities already have systems in place for this as part of their liquor licensing role.
- 12.39 Subject to feedback from submitters to this Issues Paper, our preliminary view is that this option meets the threshold for an effective and necessary industry requirement to protect public health, consumer interests, and ensure compliance with other matters of importance such as requirements to register a death. In principle, we consider that all providers should be able to meet the standards set out above and that this should be independently verified through the licensing mechanism, which will provide assurance to consumers. If someone is offering funeral services to the public without adequate knowledge of the necessary health precautions and means of mitigating offence caused by bodily decay, there is a risk of poor standards of service and potentially a risk to public health more generally. It is arguable that the current lack of oversight of the sector does not meet public expectations, and has the potential to create adverse outcomes.
- 12.40 The alternative critique of this option may come from those who consider that licensing is a positive but not sufficient step. In our view, further evidence of industry shortcomings would be required to justify more extensive regulation. For discussion purposes we have developed an alternative in Option 3, which would provide greater oversight through compulsory complaints processes. We invite submitters to compare the merits of Option 2 and Option 3, and consider where the appropriate balance should be struck between maintaining an open sector and the imposition of regulatory standards.

### **Option 3: Industry complaints authority**

#### *What is this reform intended to address?*

- 12.41 Options 1 and 2, either combined or individually, may be considered a sufficient response to the issues at hand. However, based on initial feedback from the funeral sector, we have also considered an additional measure which is intended to foster higher standards and better enforcement of complaints. This option is to require providers of funeral services to abide by a code of conduct and complaints procedures of an independent body.
- 12.42 We have spoken to many members of FDANZ who consider that there should be some form of compulsory complaints mechanism, possibly through mandatory affiliation with their own organisation or another approved industry organisation. Some funeral directors consider that this would promote higher standards and allow for more effective enforcement in response to consumer complaints. It is argued that a compulsory code of conduct would be a useful way

of ensuring that all funeral directors meet consumer expectations of professional standards within the sector, and would address the concern that existing industry bodies are less than fully effective because many funeral directors choose not to join, and are not subject to any professional standards.

- 12.43 Compared with the status quo it is argued that a compulsory code of conduct would establish clear expectations for standards of service, and prevent unreliable providers from taking advantage of vulnerable consumers. This option may be preferred to licensing for several reasons. First, the code of conduct would establish standards of service rather than standards of knowledge. Second, there would be mandatory sanctions for a failure to meet these standards, and remedies for consumers if standards are not met. It could be argued the combination of these two factors would better protect consumers, who will have greater confidence in the level of service to which they are entitled. Finally, this option could also be preferred to licensing because codes of conduct are more flexible than regulations, and can address a wider range of issues. This option may also be preferred because it does not place an additional enforcement burden on local authorities.

*What new obligations would be introduced?*

- 12.44 We have considered two possibilities for the development of this option. One possibility is to establish an independent body, perhaps with some lay members representing consumer interests. This industry body would develop a mandatory code of conduct and a complaints mechanism, which would apply across the sector.
- 12.45 A second possibility, and one that is more likely to be favoured by some in the sector, is to provide an approvals process for existing and new industry bodies. Industry bodies would have to demonstrate that they have a robust code of conduct and effective sanctions against members who breach these codes. Funeral service providers would have to be affiliated with an approved body but could choose which industry body to become affiliated with. New industry bodies (for example, one focused on eco-funeral services), could be established. Under this model, it would be prohibited to offer funeral services for a fee without agreeing to be bound by the code of conduct and complaints mechanisms of an approved industry body.
- 12.46 We consider that the “complaints authority” model is a better option than the “compulsory affiliation” model. A complaints authority acting to enforce a code of conduct has the advantage of independence, and would be accountable to the general public. Conversely, an inherent conflict arises between a regulatory role and an industry representative role, which presents a significant challenge for the compulsory affiliation model. When affiliation is voluntary, industry bodies are free to develop their own codes of conduct and enforcement mechanisms, consistent with an overall purpose of providing services to members. The industry body remains accountable to members, and the complaints mechanism can be seen as a secondary feature to ensure the reputation of the organisation and its membership is not undermined by the unwelcome behaviour of a minority of members. However, if affiliation is compulsory and is for the purpose of making complaints mechanisms available to all consumers, the conflict arises.
- 12.47 Of the two models, we therefore prefer the independent complaints authority option. This model would require a new industry body to be established with the limited mandate of (a) formulating a compulsory code of conduct, and (b) determining complaints against this code. We have not developed the operational details of this model, such as the funding mechanisms or the process for developing the code of conduct. Whether this option is developed further will depend on submitter feedback.

*Discussion*

- 12.48 Establishing a mandatory code of conduct presents some significant challenges. In particular, in an increasingly diverse sector it will be difficult to develop a single code for the range of service providers currently operating. The type of service provided by a traditional funeral home is very different to that provided by the facilitated home care or natural funeral alternatives.
- 12.49 There is a risk that a mandatory sector-wide code would interfere with the ability of new providers to enter the sector and provide services that respond to a currently unmet public need. It may also negatively affect some existing providers who offer alternative funeral styles. Improved standards achieved through a mandatory code will lead to a loss of flexibility and innovation. There will also be costs involved in establishing a sector-wide code and a suitable complaints process.
- 12.50 Inevitably, difficulties around enforcement and redress will arise, given the nature of the purchase. As noted above, there is very little scope to remedy service that is not right the first time and so it is doubtful that a complaints service will provide meaningful recourse to consumers. This point was made strongly in a review of burial legislation in Victoria, Australia in 2000, which noted that “prevention is more important than redress”.<sup>500</sup> Furthermore, research from the United Kingdom suggests that when it comes to funerals, there is a reluctance to take advantage of complaints mechanisms:<sup>501</sup>

The research also suggested that people may be reluctant to complain as many have a strong need to believe that the funeral provided was the best in order to minimise further distress. There is an almost unconscious sense that a ‘good’ funeral is necessary to initiate the healing process of the bereaved. If anything goes wrong it will be remembered forever, as there will be no second chance ... To complain may simply prolong the grief.

- 12.51 Our preliminary view is that compulsory licensing under Option 2 will effectively address the concerns that give rise to calls for mandatory codes of conduct. At this stage we do not think that Option 3 is needed as an additional measure, and we also consider that it is likely to be a less effective alternative. However, we acknowledge that industry members have identified some potential advantages and we therefore invite submitters to compare these two options to inform our final view. In particular, we invite submitters to consider the relative advantages and disadvantages of a reform that requires all providers meet a minimum standard of proficiency, enforced through licensing; and a reform that requires all providers to meet standards of service set out in a code of conduct, enforced through complaints provisions.
- 12.52 We also note that if Option 3 is not favoured, industry bodies would retain their existing role. The continued use of voluntary codes of conduct would arguably be more effective if the disclosure obligations in Option 1 are adopted (that is, requiring service providers to proactively disclose their affiliation or lack of affiliation with a body that provides a code of conduct and complaints mechanisms). The voluntary standards established through voluntary codes of conduct could complement the compulsory minimum standards introduced through a licensing requirement and result in a sector that meets higher standards overall, without significant new costs.

**ROLE OF LOCAL AUTHORITIES**

- 12.53 As mentioned above, section 49 of the Act currently provides that local authorities may permit the burial of “poor persons” free of charge, and requires them to do so on the signed order

500 Victorian Government *Review of the Cemeteries Act 1958*, above n 493, at 15.

501 Office of Fair Trading, above n 494, at [7.18].

of a Justice of the Peace. This does not seem to occur in practice. In Part 2, we argued that there are strong public policy arguments for the continued public provision of cemeteries – in part to ensure access to this important service. However, if local authority providers refuse to allow families to undertake burial or cremation independently of a funeral director, the family will be required to incur additional costs that may inhibit reasonably priced access to burial and cremation. In the United Kingdom, many councils provide a low-cost “Municipal Funeral Service,” available when the deceased is to be buried in a public cemetery or cremated in a public crematorium. This service provides a framework for families wishing to have a minimalist option, as the council will provide a very basic service and charge on a cost recovery basis only.

- 12.54 We would be interested in the public’s views as to whether there is a case for requiring at least one cemetery within each local authority area to provide a basic burial or cremation service. If considered desirable, such a direct burial service could be provided in a number of ways. For example, local authorities could enter into a partnership with a funeral director in their region to provide a basic coffin and transportation to a cemetery or crematorium. Alternatively a local authority could offer a minimalist service as part of its cemetery services. If total costs including cremation or burial were pegged to the Work and Income grant, there may be a case for removing the current obligation on local authorities to bury bodies free of charge in certain circumstances.

## CONCLUSION

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- 12.55 In this Part, we have considered the current regulatory framework for funeral directors, as required by our terms of reference. We have identified three options for reform, two of which we suggest could work well within our current legal framework to provide greater assurance to consumers without imposing undue regulatory burdens on providers. We also present for discussion a third option, which we do not favour at this stage. We invite submissions on all three reform options and we are particularly interested in receiving public feedback on the need for reform.

### CONSULTATION QUESTIONS

- Q11 Do you think those providing funeral services to the public should be required to proactively disclose the costs of the different components of their services? Please give your reasons.
- Q12 Should those providing funeral services to the public be required to disclose their qualifications and whether or not they are accountable to an industry body responsible for enforcing standards and considering complaints?
- Q13 Do you think those providing funeral services to the public should have to demonstrate they understand the laws and regulations which apply to handling human remains and have access to suitable premises and transportation methods before being allowed to operate commercially?
- Q14 Do you have any other views about the way the funeral sector currently operates including whether there is a case for a mandatory code of conduct and complaints mechanism?
- Q15 Do you think there is a case for requiring local authorities to provide a basic funeral service for those who wish to deal directly with a cemetery or crematorium?





**Part 4**  
**FACILITATING  
DECISION-MAKING  
AND MANAGING  
DISAGREEMENT**



LAW · COMMISSION  
TE · AKA · MATUA · O · TE · TURE

# Chapter 13

## Overview of Part 4

### INTRODUCTION

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- 13.1 When a person dies, the family and friends, or survivors of the deceased,<sup>502</sup> must make a number of decisions. One of the most pressing and most significant is whether to bury or cremate the body.<sup>503</sup> If burial is chosen they must also choose a burial site. The views of the deceased may be influential in making those decisions.
- 13.2 These decisions are significant for survivors and carrying them out is important for the dignity of the deceased. There is also a public interest in seeing the body of deceased persons appropriately laid to rest. In some cases, notably if there is entrenched disagreement, recourse to the law may be required so that the body can be buried and these interests can be given effect.
- 13.3 Part 4 examines the legal framework around burial decisions and how the potential for disagreement at this time is managed. The Burial and Cremation Act 1964 is silent on many aspects of the decision-making process, so much of the discussion centres on the applicable common law, the body of law derived from court cases.
- 13.4 We discuss in this Part whether it may be in the public interest to replace the common law approach with a new statutory regime setting out the decision-making rights and duties of survivors of the deceased, and providing a statutory process for resolving disputes. We are primarily concerned with two issues:
- who, if anyone, should have the legal right to make decisions about such matters; and
  - where serious disagreements arise, how they should be resolved.

### CONTEXT AND BACKGROUND

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- 13.5 In all common law countries, disputes over the body have become more frequent over the last century as cultural and religious diversity within families increases, and family arrangements and relationships become more complex. Changing social attitudes towards death mean that people may now expect a greater level of control over their own post-death arrangements. The emergence of a professional funeral industry has decreased the level of direct family involvement in preparation of the body. However, increasingly death and bereavement literature is recognising that it is crucial for family to be involved in the post-death period in some way, in order to facilitate the grieving process and bring closure.<sup>504</sup> In turn, courts and academics have begun to become increasingly aware of the effect of these disputes on survivors,

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502 Throughout Part 4 we use the term “survivors” to refer to the family and friends of the deceased – that is, all those who have an interest in the burial of the deceased and care and custody of their body including the deceased’s partner or spouse, those related to the deceased by kin, and friends.

503 Throughout Part 4 we sometimes use the terms “burial” or “form of burial” to cover both burial and cremation of a dead body. Burial (including eco-burial) and cremation are by far the two most popular methods of disposition of a deceased body in New Zealand, and while other methods are being explored, these are not yet widely available: see the discussion of alternative methods of disposition in ch 8 at [8.12].

504 Tanya K Hernandez “The Property of Death” (1998–1999) 60 U Pitt L Rev 971 at 991.

their effect on the exercise of cultural and religious rights, and the implications for the dignity of deceased persons.

### Burial disputes

- 13.6 Burial decisions or decisions concerning care and custody of the body arise at a time of high emotions and sometimes stress. The reasons why family and friends of the deceased might disagree over such decisions have been explored in depth by Conway and Stannard.<sup>505</sup> Cultural and religious beliefs could be involved. The particular parties who are in dispute could include people related or unrelated to the deceased by kin and could be members of a single family (such as siblings) or two different families (such as the deceased's partner and the deceased's family of birth).
- 13.7 New Zealand has seen only a small number of burial disputes litigated in court, and on a narrow range of facts.<sup>506</sup> But given New Zealand's increasing ethnic diversity, and diversity of cultural and religious beliefs towards death and how it should be responded to, it is reasonable to assume that burial disputes will continue to occur.<sup>507</sup> People may also be increasingly prepared to challenge burial decisions in light of judicial endorsement in *Takamore v Clarke* of the supervisory role of the High Court.<sup>508</sup> It is timely, then, to consider whether the existing common law is principled and fit for purpose.

### Burial disputes involving Māori and Pākehā

- 13.8 An important discussion in this Part concerns burial disputes involving both Māori and Pākehā and involving application of tikanga Māori/Māori customary law, which may be particularly complex and legally difficult.<sup>509</sup> During the preliminary stages of this review, a legal dispute involving tikanga Māori was being heard at three levels of the New Zealand courts.<sup>510</sup> The number of people who identify as both Māori and Pākehā, and the number of families/whānau containing both Māori and Pākehā members, may mean that legal disputes raising tikanga Māori will continue to arise in future.<sup>511</sup>
- 13.9 Māori and Pākehā cultural practices and responses to death differ, which can create a risk of cultural misunderstanding. In Pākehā cultural tradition a proper burial within a relatively short timeframe is assumed to help people achieve closure and facilitate the mourning process. It can be viewed as unseemly or disrespectful to argue over the body of a dead person.<sup>512</sup> In tikanga Māori settings, by comparison, it may be several days before the body is finally buried. There may be debate and discussion over the final resting place of the body, a process that places great significance on the deceased's whakapapa links and which is considered to pay respect to the deceased's mana and the mana of their whānau.

505 Heather Conway and John Stannard "The Honours of Hades: Death, Emotion and the Law of Burial Disputes" (2011) 34(3) UNSW Law Journal 860.

506 The first burial dispute heard by a New Zealand court was *Murdoch v Rhind* [1945] NZLR 425. Since then the courts have decided only four or five substantive cases concerning burial rights: see ch 14.

507 A number of cases were reported in the media in 2009; see for example Martin Van Beynen "Families settle row over final rites" (24 December 2009) *Stuff* < www.stuff.co.nz > and Fairfax NZ News "Whānau fight over burial of body" (1 January 2009) *Stuff* < www.stuff.co.nz > .

508 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733. See the discussion in ch 15 for more detail on the decision in *Takamore* and the operation of the executor rule in New Zealand.

509 Throughout this Issues Paper we refer to the body of law, values, practices and procedures found in the Māori context collectively as "tikanga Māori" or "Māori customary law". We use these terms interchangeably.

510 *Clarke v Takamore* [2010] 2 NZLR 525, (2009) 27 FRNZ 676; *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573; *Takamore v Clarke* (SC), above n 508. See also the terms of reference for this review directing the Law Commission to examine the responsiveness of the Burial and Cremation Act 1964 to the beliefs, customs and practices of Māori.

511 See figures cited in Kiri Edge and Waimarie Nikora *Different Coloured Tears: Dual Cultural Identity and Tangihanga* (Tangi Research Programme Working Paper 2, Māori and Psychology Research Unit, University of Waikato, January 2010) at 3–4.

512 See for instance the comments of Northcroft J in *Murdoch v Rhind* [1945] NZLR 425 (SC) at 426, cases cited in Conway and Stannard, above n 505 at 887–889, and "In grief, there are times when there can be no peace" *The Press* (Christchurch, 25 August 2007) at A23.

- 13.10 That is not to suggest that disagreement over the burial location only ever arises where the deceased or their family is Māori.<sup>513</sup> But a key difference may be that tikanga Māori provides an opportunity for those related to the deceased to claim the entitlement to bury the deceased's body in their tribal area, which may also involve moving the body to a different marae or temporary resting place. Where this happens it tends to attract public attention, and sometimes cultural misunderstanding of the principles and values that lie behind that process.<sup>514</sup>
- 13.11 The potential for this cultural misunderstanding to afflict families/whānau with both Pākehā and Māori members has been expressed in research carried out at Waikato University:<sup>515</sup>
- Theoretically, whānau/family of dual cultural origin may enjoy the resources of two cultural communities which afford choices of rituals from two cultural worlds. However, the potential for conflict, tension and misunderstanding cannot be ignored. These families may be required to negotiate two sets of cultural values, beliefs and expressions within their bereavement. Inevitably, failure to negotiate these issues satisfactorily may have a huge impact upon bereaved families and the means by which they are supported within their grief.
- 13.12 Not only are those disputes difficult because of their cultural dimension, they are also legally complex as they raise the debate around the status of tikanga Māori and its place in the law.
- 13.13 Under common law if survivors disagree, the burial decision is made by a single person (the executor). Common law judges actively discourage disputes and repeatedly emphasise the need and desire for cases to be decided swiftly. In contrast, Māori customary law facilitates and encourages discussion and argument over the place of burial. The emphasis is on collective discussion and debate in deciding where the deceased will lie.
- 13.14 This Issues Paper occurs against the background of continuing debate on the interaction between Māori customary law and common law. The Supreme Court's treatment of tikanga in *Takamore v Clarke* has sparked fresh discussion,<sup>516</sup> although the debate extends beyond burial decisions. Accordingly, in considering options for statutory reform, we have tried to leave space for those debates to unfold. We recognise that tikanga can be both custom and law and we wish to leave space for both those things within any new statutory regime. With the assistance of the Law Commission's Māori Liaison Committee, we have tried to assess the implications of the options for statutory reform on tikanga Māori, and have tried to draw on legal concepts and institutions, which may be well placed to take account of Māori customary law in burial disputes.

### Other kinds of disputes

- 13.15 After death, decisions as to what ceremonies or rituals to carry out will also be required. Other decisions after the immediate post-death period has passed include how to memorialise the deceased and how to handle any ashes. Less frequently, the survivors of the deceased might also be required to consider possibly disinterring the body or interring another body in the same plot.

513 See " 'Snatched' body buried by family" *Waikato Times* (online ed, 6 March 2008) where the deceased was not Māori but had married a Māori man. The dispute appeared to be due to the deceased's daughter feeling guilty for not spending time with her mother during her life. See also Martin Van Beynen "Families settle row over final rites" (24 December 2009) *Stuff* < www.stuff.co.nz > .

514 See media reports where this movement of the body is referred to as "body snatching": Mike Watson "No rest over body-snatching case" (22 December 2011) *Stuff* < stuff.co.nz > ; "We're not body snatchers; family" *The Southland Times* (online ed, Southland, 14 March 2008); James Ihaka "Ashes of 'snatched' body given to mother's family" *New Zealand Herald* (online ed, Auckland, 22 December 2007). See also the facts of the case *Awa v Independent News Auckland Ltd* [1995] 3 NZLR 701 (HC).

515 Edge and Nikora, above n 511, at 4.

516 See Natalie Coates "What does Takamore mean for tikanga? – Takamore v Clarke [2012] NZSC 116" (2013) February Māori LR and Laura Lincoln "Takamore v Clarke: An Appropriate Approach to the Recognition of Māori Custom in New Zealand Law?" (2013) 44 VUWLR 141.

- 13.16 In this Issues Paper we primarily examine the potential for disputes over burial (encompassing burial location or the decision of whether to bury or cremate the body).<sup>517</sup> However, because we are directed to consider “care and custody” of the body more broadly, we also consider other kinds of decisions that arise (for example decisions as to memorialisation).<sup>518</sup>
- 13.17 There are few reported burial disputes on these secondary decisions in New Zealand.<sup>519</sup> Courts in other jurisdictions have heard a range of disputes on such topics including:
- whether the ashes of the deceased’s body should be divided between family members;<sup>520</sup>
  - who decides what headstone is placed on the grave of the deceased;<sup>521</sup> and
  - whether the deceased’s remains should be exhumed from a municipal cemetery and reinterred in a Jewish cemetery.<sup>522</sup>
- 13.18 Disputes over donations of organs or bodies fall outside the scope of our review. These are dealt with under the Human Tissues Act 2008 and related policies and guidelines.<sup>523</sup>

## OUR APPROACH

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13.19 Burial disputes “stand at the intersection of a number of competing principles”<sup>524</sup> including the dignity of the deceased, the rights and interests of survivors, and cultural and religious rights. They arise at times of emotional stress and sadness but they must also be decided without too much delay. Any proposals for statutory reform will inevitably have to grapple with these intersecting interests and values. We recognise that this is an area where practice can and does deviate from strict law and we consider that any statutory reform must be flexible enough to accommodate a range of approaches, including tikanga Māori. Therefore we raise the following key policy questions.

### Should our law recognise a right of decision?

13.20 This is a question of first principle and one that was discussed by members of the Supreme Court in *Takamore v Clarke*.<sup>525</sup> The main question is whether and at what point it is appropriate, in an area where family and whānau play such a significant and usually collective role, for the law to recognise a “right” of decision in relation to burial matters that could potentially override or defeat the interests of others.

### Who might be entitled to exercise a right of decision?

13.21 New Zealand common law holds that, in the event of a dispute, the executor of the deceased’s will has the right to determine what happens to the body. The executor’s right to decide is qualified by the need to consider the views of the deceased and of their family and friends, including where these views are based on cultural, spiritual or religious beliefs. Ultimately, however, the executor has the legal right of decision, subject to court oversight.

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517 See above n 503.

518 See ch 18.

519 But see *Watene v Vercoe* [1996] NZFLR 193 (FC) and *Pauling v Williams* CA 69/00, 18 August 2000.

520 *Leeburn v Derndorfer* [2004] VSC 122, (2004) 14 VR 100.

521 *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

522 *Re Durrington Cemetery* [2000] 3 WLR 1322.

523 Human Tissue Act 2008, ss 31, 39–46 and “Human Tissue Act” Ministry of Health < [www.health.govt.nz](http://www.health.govt.nz) > .

524 *Leeburn v Derndorfer*, above n 520, at 10.

525 *Takamore v Clarke* (SC), above n 508, at [55]–[90] per Elias CJ.

- 13.22 The rights of the executor are widely recognised at common law (although not necessarily well known amongst the public), but the executor rule has come under significant critique and analysis in recent years, particularly with social and cultural changes in common law countries that have affected how death is handled. If the executor is not the appropriate person to exercise a right of decision, we might then ask who is, and how that person or persons could be identified within a possible new statutory regime.

### **What role should the courts have in managing disagreement and resolving disputes?**

- 13.23 At present burial disputes are heard in the High Court. A person might ask the Court to determine who is entitled to control disposition. If a body has been taken without consent, and family or friends are afraid it might be disposed of against their wishes, they might apply to the Court for urgent orders to prevent disposition and/or to seek to have the body returned to their custody. We ask whether the High Court should remain the forum in which such disputes are heard, and consider possible alternatives.

### **STRUCTURE OF PART FOUR**

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- 13.24 In chapter 14 we examine the common law framework currently governing decision making and dispute resolution between survivors, and the tikanga-based processes that may be engaged when the deceased is of Māori descent. We also discuss how these matters are dealt with in other jurisdictions.
- 13.25 In chapter 15 we assess the executor rule, considering both its practical limitations and undertaking a principles-based critique of the rule.
- 13.26 In chapter 16 we raise the option of statutory reform of the executor rule. We discuss the range of considerations involved in designing a statutory replacement for this common law rule, and the various approaches that might inform this.
- 13.27 In chapter 17 we discuss the role of the courts as the final arbiter in burial disputes and put forward for consultation some alternative options for dispute resolution. We examine the available remedies and options in the rare event that a body is taken away from those who have legal or practical custody.
- 13.28 Finally in chapter 18, we examine secondary decisions such as control of ashes, memorialisation, decisions around disinterment and additional interments, and public policy issues relating to the disposal of human ashes.

# Chapter 14

## New Zealand law on care and custody of the body

- 14.1 There is no provision in the Burial and Cremation Act 1964 (the Act) setting out a legal right of decision in a dispute over the body of a deceased person. Although section 46E of the Act requires the person “having charge of a body” to dispose of it within a reasonable time, that does not confer a legal right on any specific, identifiable person such as a partner or family member of the deceased.
- 14.2 Accordingly, the courts have looked to common law, the body of law derived from court decisions, to determine who does, or should, have the legal right of decision regarding care and custody of the deceased’s body.

### RIGHTS OF THE EXECUTOR

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- 14.3 The central rule of common law in this area is that the executor of the deceased, who is the person named in the deceased’s will to carry out the deceased’s directions for their property, has the right of decision regarding the burial of the deceased.<sup>526</sup> This common law right was first discussed in New Zealand in the 1945 case of *Murdoch v Rhind*,<sup>527</sup> in which the wife of the deceased contested the right to determine the deceased’s form of burial with the deceased’s brother, his brother having been named as executor in the deceased’s will. The deceased’s brother, as executor, was held to have the right to decide the form of burial. Northcroft J said:<sup>528</sup>

Not only has the executor the right, he has the duty, of disposing of the body of the deceased. It is for him to say how and where the body shall be disposed of. I can do no more than pronounce accordingly.

- 14.4 More recently, the executor’s common law right of decision has been discussed and upheld in litigation arising from the burial dispute over the body of Mr James Takamore.<sup>529</sup> The executor holds this right of decision regardless of the deceased’s cultural or religious background, although the deceased’s cultural or religious practices and beliefs, and those of their family, must be taken into account by the executor when making their decision.<sup>530</sup> Where the deceased is Māori or where principles and practices drawn from tikanga Māori are claimed to apply, tikanga is treated as a value that the executor must take into account.<sup>531</sup> We refer to the executor’s right of decision as the “executor rule”.
- 14.5 In its decision over the burial place of Mr Takamore, the Supreme Court clarified how the executor rule operates in New Zealand common law. It held that:

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526 *Williams v Williams* (1882) 20 Ch D 659; *Murdoch v Rhind* [1945] NZLR 425; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

527 *Murdoch v Rhind*, above n 526.

528 At 427.

529 *Takamore v Clarke* (SC), above n 526, at [152].

530 At [156].

531 At [164].

- The executor’s rights only become operative “where there is no agreement or acquiescence on what is to be done, when arrangements have broken down, or where nothing is happening”.<sup>532</sup> Prior to that it may be assumed that burial can be organised by anyone who is willing and able to do so.
  - The executor should take into account: any views expressed by the deceased;<sup>533</sup> the views of those who were close to the deceased where those views are conveyed to the executor; and customary, cultural or religious preferences, including Māori burial practice, if such preferences are raised by family or whānau or if they form part of the deceased’s heritage.<sup>534</sup>
  - The executor has a right of possession of the body for the purpose of carrying out their decision.<sup>535</sup>
- 14.6 The executor’s right of decision at least encompasses the right to decide the location and form of burial. It is unclear whether the executor’s legal right of decision extends, for instance, to determining funeral rites and ceremonies<sup>536</sup> or to possession of the ashes of the deceased.<sup>537</sup> It has been suggested that the executor has the right to control the memorialisation of the deceased,<sup>538</sup> but legally the scope and content of the executor’s rights in these matters remain unclear in New Zealand common law. These and other questions will be answered progressively as cases come before the High Court and as New Zealand common law in this area continues to develop.

### Review in the High Court

- 14.7 A majority of the Supreme Court in *Takamore v Clarke* held that New Zealand common law has reached the position whereby a person can apply to review the executor’s decision in the High Court.<sup>539</sup> In such proceedings, the Court should:<sup>540</sup>
- [A]ddress the relevant viewpoints and circumstances and decide, making its own assessment and exercising its own judgment, whether an applicant has established that the decision taken was not appropriate.
- 14.8 The majority was not explicit as to the jurisdiction or procedure under which those and related proceedings would be brought.<sup>541</sup> We discuss this further at the end of this chapter.

### Relevant statutory provisions

- 14.9 We also note that the executor’s common law right is subject to relevant statutory provisions. If the person died in violent, sudden or unnatural circumstances, the Coroners Act 2006 applies and the Coroner has statutory authority to take custody of the deceased’s body in order to determine the cause of death.<sup>542</sup> The executor’s common law right of decision may also be

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532 At [154].

533 At [156].

534 At [156] and [164].

535 *Williams v Williams*, above n 526; *Murdoch v Rhind*, above n 526; *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [200]. See also *Re Clarke (Deceased)* [1965] NZLR 182.

536 See for example the background to the case *Awa v Independent News Auckland Ltd* [1995] 3 NZLR 701 (HC), where there was disagreement over where to hold the memorial service for the deceased prior to burial.

537 See ch 18.

538 *Watene v Vercoe* [1996] NZFLR 193 (DC) at 196.

539 *Takamore v Clarke* (SC), above n 526, at [160].

540 At [162].

541 Elias CJ treated it as falling within the High Court’s inherent jurisdiction: at [7].

542 Coroners Act 2006, ss 18–19.

affected by the existence of the deceased's prior consent to donate their body under the Human Tissues Act 2008.<sup>543</sup>

## TIKANGA MĀORI CONCERNING CARE AND CUSTODY OF THE BODY

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- 14.10 Tikanga Māori contains a set of distinctive practices and principles that deals with care and custody of a deceased's body, organisation of final burial arrangements, and decision-making among whānau, hapū and iwi of the deceased. These processes begin to unfold immediately upon death and continue throughout the tangihanga (tangi) held for the deceased.<sup>544</sup>
- 14.11 It is important in tikanga Māori to maintain the strength of the deceased's whakapapa (genealogical) connections with past ancestors and future descendants. As a result it is expected that the deceased will be buried in their ancestral lands or the place of their birth. This is not a rigid rule.<sup>545</sup> In contemporary times, many Māori are born or live outside of their tribal territories, and this can affect the outcome of the decision as to burial location and sometimes also whether burial or cremation is chosen.<sup>546</sup>
- 14.12 The process of reaching decision is important. Emphasis is placed on giving adequate expression to core underpinning values, including maintaining whakapapa connections and allowing time for debate and discussion.<sup>547</sup> The final decision might be reached by way of consensus, compromise, or acquiescence; or by one party exercising greater influence or willpower over the other; but there is usually an emphasis on all present "owning" the decision.<sup>548</sup> It is important that any conflict is not left unresolved, or it is thought that the wairua (spirit) of the deceased will linger and the passage of the deceased to the status of ancestor will remain incomplete.<sup>549</sup> Complete spiritual death only occurs once the tangihanga and its rituals have been properly concluded.

### Rituals at the tangihanga

- 14.13 Tangi can last several days and involve large numbers of people travelling from all over the country to pay their respects to the deceased.<sup>550</sup> They frequently include lengthy discussion or debate as to the most appropriate burial location for the deceased.
- 14.14 One of the rationales for the tangi is to provide an opportunity for members of the deceased's whānau and hapū from both near and further afield to make a claim for the deceased to be buried in their own home territory or in a specific place.<sup>551</sup> This is important to avoid breaking the continuity of whakapapa lines and to reinforce whanaungatanga values.<sup>552</sup> Having the deceased in home territory also strengthens the mana of the family group by drawing their

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543 The Human Tissues Act 2008 allows a person to make a legally binding consent to donation of their body or body parts for therapeutic, scientific or educational purposes.

544 See generally Linda Waimarie Nikora, Bridgette Masters and Ngahua Te Awekotuku "Final Arrangements following Death: Maori Indigenous Decision Making and Tangi" (Māori and Psychology Research Unit, University of Waikato, 13 March 2012). See also Kiri Edge and Linda Waimarie Nikora *Different Coloured Tears: Dual Cultural Identity and Tangihanga* (Tangi Research Programme Working Paper 2, Māori and Psychology Research Unit, University of Waikato, January 2010).

545 See the discussion of what happened after the death of Prince Tui Teka in 1985: Nin Tomas "Who Decides where a Deceased Person will be Buried – Takamore Revisited" (2008–2009) 11–12 *Yearbook of New Zealand Jurisprudence* 81.

546 Note that Māori living overseas may be more likely to choose cremation as ashes are more easily transportable back to New Zealand.

547 Tomas, above n 545, at 92.

548 See for example the summary of Tūhoe tikanga in *Clarke v Takamore* [2010] 2 NZLR 525 (HC). A body may be taken "through cunning, courage and determination and willpower that it is the right thing to do." The tūpāpaku must be given an appropriate tangihanga and burial afterwards and the party that took the body may be required to "provide something to reciprocate and satisfy the aggrieved party": at [57].

549 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 147–149.

550 See ch 2.

551 Tomas "Who Decides where a Deceased Person will be Buried – Takamore Revisited", above n 545, at 92.

552 Nin Tomas "Ownership of tūpāpaku" [2008] NZLJ 233 at 235. Whanaungatanga is a tikanga value expressing the importance of relationships between all things including between people, between people and the physical world, and between people and spiritual entities.

descendants back to them.<sup>553</sup> Claiming the body of the deceased is also necessary to recognise the mana of the deceased or their family. It is considered a compliment and a mark of respect, as noted by Nin Tomas:<sup>554</sup>

Without passionate displays and claims of whanaungatanga and whakapapa to raise the mana of the deceased and proclaim ancestral worth, how can his or her ongoing value as part of the community be acknowledged?

- 14.15 The process of coming to the tangi to make a claim for the body of the deceased also challenges the local hapū to demonstrate that they will properly care for the deceased in its final resting place and will fulfil their ongoing responsibilities.
- 14.16 Claims may range in intensity. They may be made merely out of politeness and respect to the deceased. At other times the claim may give rise to heated disputes of a proprietary nature over the body of the deceased, and the body may be moved to a different marae for burial in a different urupā.<sup>555</sup> Speaking up and insisting on one's claim to the deceased may be important, as walking away or remaining silent can sometimes be seen as implicit acceptance that the claiming party may take the body.<sup>556</sup> However, the party who succeeds in their claim may face obligations and conditions that continue for generations after the burial location has been decided.
- 14.17 It is important for someone with knowledge and expertise in tikanga to manage the process to avoid causing unnecessary distress. This could be a kaumātua (elder) who is experienced in tikanga matters and who is able to take into account long-term considerations and ensure tikanga is upheld, not only for surviving hapū and iwi members but also for their ancestors and descendants.

### TAKAMORE V CLARKE

- 14.18 The case of *Takamore v Clarke* is the most significant legal development in this area of New Zealand common law in recent years. It has added to judicial consideration of the executor rule in New Zealand common law, which before that had been considered by only a small number of New Zealand cases. It is also legally significant because it considers the interaction between the common law, in the form of the executor rule, and tikanga Māori. We briefly discuss how the case arose and the significant points of the decisions of the High Court, Court of Appeal and Supreme Court.

#### Facts of the case

- 14.19 The case concerned an application to the High Court by Denise Clarke for orders for the recovery of the body of her long-term partner, James Takamore. Mr Takamore and Ms Clarke had lived together in Christchurch for over 20 years and had two adult children. Mr Takamore was originally from the Bay of Plenty and was of Ngāi Tūhoe and Whakatōhea descent.
- 14.20 After Mr Takamore died unexpectedly in 2008, Ms Clarke and their two children decided to bury his body in the Ruru Lawn Cemetery in Christchurch, and arranged to have his body lie in state on a local marae for a few days prior to burial.

553 At 235.

554 At 233.

555 Tomas "Who Decides where a Deceased Person will be Buried – Takamore Revisited", above n 545, at 92.

556 Tomas "Ownership of tūpāpaku", above n 552, at 235.

- 14.21 In the days preceding his funeral, members of Mr Takamore’s Bay of Plenty family travelled to Christchurch and entered into discussions with Ms Clarke to bury Mr Takamore’s body in an urupā in the Bay of Plenty alongside his father and other ancestors. Discussions went on over the course of the day, but no conclusion was reached. After Ms Clarke and her children eventually went home for the night, members of his Bay of Plenty family placed Mr Takamore’s body in a van and took it to the Bay of Plenty. They buried the body in the family urupā there in accordance with the tikanga observed by their hapū.
- 14.22 In the interim, Ms Clarke obtained an urgent court order to prevent burial in the Bay of Plenty from taking place and for police to take custody of the body. The order was not served before burial went ahead.<sup>557</sup> Ms Clarke then applied for an order to disinter the body in an application to the High Court.<sup>558</sup> She based her claim on her status as executor of Mr Takamore’s will, which she said gave her the right and duty to determine what happened to his body, drawing on English and New Zealand common law.
- 14.23 Mr Takamore’s sister, mother and brother opposed the claim, arguing that New Zealand law does not recognise the executor rule where the deceased is Māori. In that case, Māori customary law should apply, and it would then be for the whānau pani and hapū (the deceased’s close family and tribal sub-group, respectively) to determine the location of burial in accordance with principle and practice drawn from tikanga Māori.

### Decisions in the High Court and Court of Appeal

- 14.24 The High Court and Court of Appeal both found in favour of Ms Clarke, on the basis that New Zealand recognises a common law right of decision which vests in the executor of the deceased in a burial dispute. Tikanga Māori could not apply to determine the dispute in this case.
- 14.25 Fogarty J in the High Court held that, under common law, an executor named in the will of the deceased who is “ready, willing and able to arrange for the burial of the deceased’s body” has the right of possession of the body as against all others.<sup>559</sup> He then examined “whether and how Tuhoe tikanga collides with the common law”.<sup>560</sup>
- 14.26 He concluded, based on the evidence available to the Court, that Tuhoe tikanga had not evolved to allow “an individual of Tuhoe descent, living outside tribal life, to make decisions for him or herself, or for their immediate family to make decisions on their own behalf, as to where his or her body is to be buried.”<sup>561</sup> Relying on a requirement of reasonableness, he concluded that the application of Tūhoe tikanga in the whole of the circumstances of the case was not reasonable, being contrary to underlying principles of individual freedom contained in the common law.<sup>562</sup>
- 14.27 Upon appeal by members of the Takamore family, the majority of the Court of Appeal affirmed the existence of the executor rule in New Zealand common law.<sup>563</sup> They also considered whether Tūhoe customary law could nonetheless apply to determine the dispute, and required it to be continuous, reasonable, and certain before it could be recognised within common law and applied by the courts. Insofar as the relevant custom authorised one party taking the body of the deceased without consultation, the majority found it to be contrary to the principle of “right

557 *Clarke v Takamore*, above n 548 at [7].

558 At [9].

559 At [47].

560 At [53].

561 At [73].

562 At [89]. Fogarty J said he had reached this conclusion “without the need to formally decide: (a) the content of the relevant Tuhoe tikanga; and (b) whether it is part of the common law of New Zealand.”

563 *Takamore v Clarke* (CA), above n 535, at [236], [259] and [262] per Glazebrook and Wild JJ.

not might” and therefore not reasonable.<sup>564</sup> The majority held, therefore, that it could not apply to determine the dispute.<sup>565</sup> The majority also noted that applying Tūhoe custom to determine a dispute might raise conflict of law issues between those entitled to rely on Tūhoe custom and those who come under the common law rules.<sup>566</sup>

- 14.28 They then went on to suggest “a more modern approach” towards custom law might be possible. Under such an approach custom law would be integrated into the common law where possible, rather than subjected to strict recognition-based rules as has been the orthodox approach of the courts.<sup>567</sup> Here, for example, the executor could be required to facilitate a process of discussion and negotiation among members of the whānau pani, although the final decision would still ultimately be that of the executor.<sup>568</sup>

### The Supreme Court’s decision

- 14.29 The Court of Appeal’s decision was then appealed to the Supreme Court.<sup>569</sup> The case was heard over two days in December 2012, which by now was four years since Mr Takamore’s death.
- 14.30 The Supreme Court unanimously held that Ms Clarke should have the right to decide where the body lay, although the members of the Court reached that decision for different reasons. The majority (McGrath, Tipping and Blanchard JJ) held that that the executor rule formed part of New Zealand common law. The Court’s role was to assess the appropriateness of the executor’s decision. The majority found that Ms Clarke’s decision to bury the body in Christchurch was appropriate. The minority (Elias CJ and William Young J) concluded that the executor rule was not part of New Zealand common law, but that Ms Clarke should, in the circumstances of the case, be entitled to make the decision as to the location of burial of Mr Takamore’s body.

### *McGrath, Tipping and Blanchard JJ*

- 14.31 The majority judgment, delivered by McGrath J, proceeded on the basis that the executor rule in New Zealand was “well-established”:<sup>570</sup>

We are satisfied that there is a common law rule under which personal representatives [executors] have both the right and duty of disposal of the body of a deceased.

- 14.32 Accordingly, Ms Clarke as executor had the legal right of decision. The majority held that the Court was also required to consider whether her decision to bury Mr Takamore in Christchurch was appropriate.<sup>571</sup> They noted that, although this was a case with “deeply held views”, having regard to Mr Takamore’s life choices and that burial in Christchurch would reflect the wishes of his partner and children, the decision was appropriate and the Court would uphold it.<sup>572</sup>
- 14.33 Significant parts of the decision centred on the operation of the executor rule in New Zealand common law. First, the majority said that the executor should take into account any views expressed by the deceased but, consistent with established common law, is not legally bound to carry out those wishes.<sup>573</sup> The executor should also take into account views of those close to the deceased that are conveyed to him or her, although the executor is not required to seek them

564 At [162]–[165].

565 At [136]–[175].

566 At [192]–[196].

567 At [254].

568 At [255]. Compare the comments of the Supreme Court majority in *Takamore v Clarke*, above n 526, at [156].

569 *Takamore v Clarke* (SC), above n 526.

570 At [152].

571 At [166].

572 At [169].

573 At [156].

out and is entitled to have regard to the practicalities of achieving burial without undue delay.<sup>574</sup> The executor should also take into account preferences as to customary, cultural or religious practices, including Māori burial practice, if such preferences are raised by family or whānau, or if they form part of the deceased's heritage.<sup>575</sup>

- 14.34 Secondly, the majority said that the executor's decision can be challenged in the High Court and, significantly, that the Court will review the substance of the decision.<sup>576</sup> This approach was said to be straightforward and capable of providing a prompt decision, while also enabling the Court to ensure that the full range of interests and practices in a particular dispute are respected and recognised.<sup>577</sup> This legal development is quite novel because the trend throughout common law jurisdictions has been that where there is an executor who is willing and able to exercise the right, the court will not interfere with the substance of their decision.<sup>578</sup> The submission that the Court "should not interfere with the discretion of an executor unless it was exercised improperly, capriciously or wholly unreasonably" was rejected,<sup>579</sup> with the majority concluding:<sup>580</sup>

[T]he Court must address the relevant viewpoints and circumstances and decide, making its own assessment and exercising its own judgment, whether an applicant has established that the decision taken was not appropriate.

- 14.35 Thirdly, the majority suggested that in a dispute where there is no executor, the right of decision vests in the person who would have the right to administer the estate, according to basic rules of succession law. The person's spouse or partner would have the highest claim, followed by a hierarchy of individuals prioritised according to their kinship links with the deceased.<sup>581</sup>
- 14.36 Fourthly, the majority stated that the executor's power to ensure proper disposal of the deceased continues following burial, but that a court order will be required in addition to the disinterment licence that is required by the Burial and Cremation Act 1964.<sup>582</sup>
- 14.37 The majority decision has elaborated on aspects of the executor rule in several important ways, although questions as to its scope and operation remain.<sup>583</sup>

### *Elias CJ and William Young J*

- 14.38 Elias CJ and William Young J took a different view as to the rights of executors in this context. In separately written judgments, neither Judge recognised the executor rule as forming part of New Zealand common law.<sup>584</sup> Both would have upheld the decision of Ms Clarke to bury the body in Christchurch, but not on the basis of her status as executor.<sup>585</sup>
- 14.39 Elias CJ noted that "the common law as to control of burial is obscure"<sup>586</sup> and that "New Zealand authorities are few and sparsely reasoned" and that she did not regard them as

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574 At [156].

575 At [156] and [164].

576 At [162].

577 At [162].

578 See *Takamore v Clarke* (SC), above n 526, at [171] per William Young J; *Takamore v Clarke* (CA), above n 535, at [204].

579 At [161].

580 At [162].

581 At [143]–[148].

582 At [159].

583 See ch15.

584 At [90] per Elias CJ and at [214] per William Young J.

585 At [101]–[107] and [175].

586 At [51].

authoritative in the present case.<sup>587</sup> She regarded the executor rule as inappropriate having regard to modern social conditions and expectations, impractical, inconsistent with tikanga and with the established common law position that there is no property in a body.<sup>588</sup> Of the majority's approach, she said:<sup>589</sup>

It is not sufficient answer to the legitimate interests of others that the decision of the executor will be subject ... to the supervisory jurisdiction of the Court. ... I do not think deference to a primary decision-maker (even one subject to the supervision of the court) is sufficient response to the strength of the other interests affected in such cases.

14.40 William Young J critiqued the English and New Zealand cases discussing the executor's authority<sup>590</sup> and noted the practical problems the executor rule can cause.<sup>591</sup> He concluded as follows:<sup>592</sup>

The final – and I think decisive – consideration is Māori (in this case Whakatohea and Tūhoe) custom. The Chief Justice's solution does not fully accommodate custom because it provides for a decision-maker (in the form of the High Court) in lieu of a process under which there is no ultimate decision-maker and which can, in the end, only be resolved by consensus, acquiescence or submission. It does, however, involve a substantial concession to custom in that it precludes any single participant (who may not be a family member) determining the outcome. ... I accept that the reasons of Tipping, McGrath and Blanchard JJ also accommodate custom but this is to a lesser extent.

14.41 Both Elias CJ and William Young J concluded, therefore, that the executor rule does not form part of New Zealand common law and that no single participant in the burial process has a legal right of decision. Rather (in the words of Elias CJ):<sup>593</sup>

The responsibility of burial is a shared responsibility and falls to be exercised according to the circumstances. The law has no role to play except to ensure decent and prompt burial, and where dispute arises. In the absence of dispute, the executor has sufficient authority to proceed to bury the deceased. In the absence of objection by others, including the executor, the privilege of burial may equally be exercised by other close family members.

14.42 Elias CJ observed that, where family and friends fail to agree, they should approach the High Court to determine their claims under its inherent jurisdiction.<sup>594</sup>

## PREVIOUS NEW ZEALAND CASE LAW

14.43 Prior to *Takamore v Clarke* the executor rule had arisen for discussion or analysis in only a few New Zealand cases. As at 1945 it was considered to form part of New Zealand common law, and was thereafter applied at various points, as discussed below. Nonetheless when the case of *Takamore v Clarke* came before the Supreme Court in 2012, there was still some question as to the status of the executor rule in New Zealand common law, as demonstrated by the judgments delivered by Elias CJ and William Young J in *Takamore v Clarke* (see above).

14.44 In the 1945 case *Murdoch v Rhind*,<sup>595</sup> the deceased's wife wanted to cremate the body of the deceased in Christchurch. His brother, who was the deceased's sole executor, wanted to bury

587 At [62].

588 At [75]–[86].

589 At [84].

590 At [177]–[181] and [194]–[198].

591 At [208]–[211].

592 At [213].

593 At [90].

594 At [7] and [91].

595 *Murdoch v Rhind*, above n 526.

the deceased's body in the family plot in Hokitika. Northcroft J applied the executor rule from established English case law and said that the brother of the deceased, as his executor, had the right to dispose of the body.

- 14.45 In *Re Clarke (Deceased)*, which arose in 1965 and concerned financial liability for funeral expenses, it was said that executors have the right and duty to bury the deceased “in a manner suitable to the estate he leaves behind him.”<sup>596</sup>
- 14.46 In *Tapora v Tapora* in 1996,<sup>597</sup> the wife of the deceased, who was not named as executor in his will, wanted to bury his body in Auckland. But his executors were preparing to bury his body in the Cook Islands. The common law rights of the executor were treated as prevailing, although both the High Court and the Court of Appeal recognised the wife's right to apply for a recall of probate in order to control the burial decision.<sup>598</sup> Ultimately, however, no application was made, and the executors' rights prevailed.
- 14.47 In *Waldron v Howick Funeral Home* in 2012,<sup>599</sup> the family of the deceased had been planning disposal arrangements for some time. On the day of the funeral, the executor applied for an urgent injunction to prevent disposal. No explanation was given for the delay and no alternative disposal arrangements were put forth. Rodney Hansen J noted that “as a general rule, the executor or executrix is entitled to make final decisions as to funeral arrangements”.<sup>600</sup> Nonetheless, in this case the balance of convenience fell in favour of refusing the injunction, given the lateness of the application, the desire to give the deceased the dignity of a funeral without further delay, and the fact that the family had travelled from Ireland to attend the funeral and further delay would cause them inconvenience.
- 14.48 Related New Zealand cases have arisen that have turned on, or have discussed:
- the right to choose the wording on the headstone of the deceased's burial plot;<sup>601</sup>
  - the right to disinter the body of a deceased from the burial plot;<sup>602</sup> and
  - the right to control the form of burial of a deceased child.<sup>603</sup>

## OVERVIEW OF THE LANDSCAPE IN OTHER COMMON LAW COUNTRIES

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- 14.49 In its basic form, the common law burial right of the executor is similar throughout a number of jurisdictions. The United States is an exception but provides an example of a different approach.

### Australia

- 14.50 In Australia the executor rule is firmly established.<sup>604</sup> Moreover, if there is an executor who is ready, willing and able to arrange for disposal of the body, Australian courts have consistently treated their right of decision as being conclusive, rather than a priority right that can be displaced by the court.<sup>605</sup>

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596 *Re Clarke (Deceased)*, above n 535, at 183.

597 *Tapora v Tapora* CA 206/96, 28 August 1996.

598 There may have been a basis for a recall application as the deceased had not personally signed the will.

599 *Waldron v Howick Funeral Home* HC Auckland CIV-2010-404-005369, 17 August 2010.

600 At [8].

601 *Watene v Vercoe*, above n 538. See ch 18 at [18.44]–[18.45].

602 *Pauling v Williams* CA 69/00 (20 July 2000). See ch 18 at [18.68].

603 *Re JSB (A Child)* [2010] 2 NZLR 236 (HC).

604 *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

605 Lynden Griggs and Ken Mackie “Burial Rights: The Contemporary Australian Position” (2000) 7 JLM 404 at 409–410.

- 14.51 Australian courts have also heard a number of disputes where there was no executor. In *Meier v Bell*, it was held that the right to decide should vest in the person with the best claim to be appointed administrator of the deceased's estate.<sup>606</sup> Some courts have said, however, that approach is only a presumption and that it may be varied in appropriate circumstances.<sup>607</sup>
- 14.52 No Australian state or territory has enacted statutory provisions in their burial legislation to deal with the rights and duties of people in the post-death period. An individual's disposal instructions are not generally recognised as legally binding, although some states have made a statutory exception to this principle by recognising an individual's preference for or against cremation.<sup>608</sup>
- 14.53 The Queensland Law Reform Commission undertook a comprehensive review of Queensland burial legislation in 2011.<sup>609</sup> One of its recommendations was to enact a "statutory hierarchy" ranking the rights of those close to the deceased to control burial of the body, which would replace existing common law. It also recommended making the funerary instructions of the deceased legally binding. Those recommendations have not yet been taken up.

## England

- 14.54 The executor rule originated in English common law and continues today.<sup>610</sup> English cases have limited discussion of the extent of the courts' oversight of an executor's decision. In *Grandison v Nembhard* Vinelott J held that, on ordinary principles, the Court would not interfere with the executor's decision unless it was "wholly unreasonable".<sup>611</sup> In the case before the Court, the plaintiff had "not come anywhere near establishing a ground for interference" of the court. However, Vinelott J observed that it would be "surprising" if the court were limited to interfering with the decision only where the cost of carrying out the executor's decision could not be covered by the deceased's estate.<sup>612</sup> Vinelott J's comment suggests that the English courts might be more willing to examine the appropriateness of the substance of the executor's decision to a greater degree than they have traditionally done so.
- 14.55 Where there is no executor, it has been said that the right devolves to the person with the best claim to administer the estate unless there are special circumstances that would justify the court conferring that right on a different person. That approach was confirmed by Cranston J in *Burrows v HM Coroner for Preston*.<sup>613</sup>

## Canada

- 14.56 In Canada, the executor rule is also well-established in common law<sup>614</sup> but has been replaced in some provinces by statutory provisions. Alberta, British Columbia and Saskatchewan each have enacted a statutory hierarchy that prioritises the right of the personal representative named in the will to "control the disposition of human remains".<sup>615</sup> In British Columbia, that person

606 *Meier v Bell* Vic Sup Ct 4518/1997, 3 March 1997.

607 *Jones v Dodd* [1999] SASC 125 at [37]; *Dow v Hoskins* [2003] VSC 206 at [43].

608 Griggs and Mackie, above n 605, at 408.

609 Queensland Law Reform Commission *A Review of the Law in Relation to the Final Disposal of a Dead Body* (QLRC R69, 2011).

610 *Williams v Williams* (1882) 20 Ch D 659; *Rees v Hughes* [1946] KB 517; *Dobson v North Tyneside Health Authority* [1997] 1 FLR 598.

611 *Grandison v Nembhard* (1989) 4 BMLR 140 (Ch) at 143.

612 At 143.

613 *Burrows v HM Coroner for Preston* [2008] EWHC 1387, [2008] 2 FLR 1125 (QB) at [13]–[14].

614 See for example *Hunter v Hunter* (1930) 65 OLR 586; *Abeziz v Harris Estate* (1992) 34 ACWS (3d) 360, [1992] OJ No 1271 (QL); *Waldman v Melville* [1990] 2 WWR 54 (SKQB).

615 General Regulation to Funeral Services Act 1998 (Alberta), reg 36; Cremation, Interment and Funeral Services Act SBC 2004 c 35, s 5; The Funeral and Cremation Services Act RRS 1999 c F-23.3, s 91.

(the executor) is bound by the written preference of the deceased.<sup>616</sup> If there is no personal representative, next in the hierarchy is the spouse or partner, adult children, then parents and so on.

- 14.57 Ontario recognises the common law executor rule.<sup>617</sup> In *Waldman v Melville (City)* it was said that the executor had a right of possession that necessarily continued after burial, otherwise those opposed to the executor's decision could disinter the body.<sup>618</sup> The deceased cannot bind the executor to carry out their wishes.<sup>619</sup> The Ontario Law Reform Commission recommended in 1991 that statutory provisions setting out the executor's rights replace the common law, but those recommendations were not taken up.<sup>620</sup>
- 14.58 Under Canadian common law the deceased's instructions are not considered to bind the executor, but British Columbia and Quebec have both enacted legislation overriding the common law rule by recognising the right of the deceased to leave binding directions for the disposal of their body.<sup>621</sup>

## United States

- 14.59 American courts recognise a person's common law right to have their body disposed of in accordance with their testamentary wishes.<sup>622</sup> A quasi-proprietary right in the body was first recognised in *Pierce v Proprietors of Swan Point Cemetery*,<sup>623</sup> followed by numerous judicial statements of the need to uphold the wishes of the deceased, such as in *Coney v English*:<sup>624</sup> “[t]he law...gives great weight, if not controlling force, in such matters to the wishes of the deceased...[which are] paramount to all other considerations.”
- 14.60 In addition, a number of states have passed legislation governing the effect of a deceased person's directions and listing the categories of people who can make decisions about the disposal of the deceased's body. Usually this is first the deceased person themselves, or an agent appointed on their behalf to carry out those wishes, and following that the surviving spouse or partner, and so on.<sup>625</sup> The courts continue to play a prominent role, however, often weighing the wishes of the deceased against those of others who challenge them in court.<sup>626</sup>

## EVOLUTION OF THE EXECUTOR RULE AT COMMON LAW

- 14.61 The source of the executor's authority does not come from their relationship to the deceased or their family and friends, nor from any particular experience in making burial decisions or facilitating decision-making. The source of their authority towards the body comes from English

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616 Cremation, Interment and Funeral Services Act SBC 2004 c 35, s 6.

617 *Hunter v Hunter* (1930) 65 OLR 586 at 596.

618 *Waldman v Melville* [1990] 2 WWR 54 (SKQB).

619 *Saleh v Reichert* (1993) 104 DLR (4th) 384.

620 Ontario Law Reform Commission *Report on administration of estates of deceased persons* (R39, 1991) at 40–42.

621 Civil Code of Quebec LRQ c C-1991, art 42; Cremation, Interment and Funeral Services Act SBC 2004 c 35, s 6.

622 See *O'Donnell v Slack* 55 P 906 (Cal 1899); *Re Johnson's Estate* 7 NYS 2d 81 (NY 1938); *Holland v Metalious* 198 A 2d 654 (NH 1964); *Re Estate of Moyer* 577 P 2d 108 (Utah 1973); *Kasmer v Guardianship of Limner* 697 So 2d 220 (Fla 3d DCA 1997).

623 *Pierce v Proprietors of Swan Point Cemetery* 10 RI 227 (RISC 1872).

624 *Coney v English* (1914) 86 Misc 292. See also Heather Conway “Burial Instructions and the Governance of Death” (2012) 12(1) OUCJLJ 59 at 67–71.

625 See DC Code, title 3 § 3-413(a); Minnesota Statutes 2012 § 149A.80; Pennsylvania Statutes, title 20 § 305; New Mexico Statute § 24-12A-2.

626 See BC Ricketts “Validity and effect of testamentary direction as to disposition of testator's body” 7 ALR 3d 747; Frank D Wagner “Enforcement of preference expressed by decedent as to disposition of his body after death” 54 ALR 3d 1037. Both have done a comprehensive review of how the deceased's wishes have been treated by the court in a range of different scenarios.

common law. The executor rule evolved chiefly as a means of ensuring bodies were given a proper burial in the Christian tradition.<sup>627</sup>

- 14.62 The right of the executor emerged at a time when Christian burial practices were widespread in England, and the common law recognised the right of every person to a Christian burial (which was derived from the right under church law to be buried in the parish churchyard).<sup>628</sup> Burial in the Christian tradition was entrenched in English society and in English law, as reflected in a quote from the 1884 case *R v Price*:<sup>629</sup>

The law presumes that everyone will wish that the bodies of those in whom he was interested in their lifetime should have Christian burial. The possibility of a man's entertaining and acting upon a different view is not considered.

### The role of the executor

- 14.63 The law's presumption that everyone should have a Christian burial gave rise to a concomitant duty on those closest to the deceased to carry this out. In *R v Stewart* it was said that:<sup>630</sup>

We have no doubt ... that the common law casts on some one the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to leave no funds for that purpose. The feelings and interests of the living require this, and create the duty...

- 14.64 There is early common law authority that imposes the duty of burial on widowers and on the father of a dead child.<sup>631</sup> It also seems clear that, from at least as early as 1744, English common law saw the duty of ensuring the deceased had a Christian burial as falling on the deceased's executor.<sup>632</sup> This was largely a pragmatic decision: because the executor had financial control of the estate, the executor was able to reimburse themselves out of the estate, or was otherwise liable to those who had in fact carried out the duty of burial. Where disputes did come before the court they were usually about who was liable for the cost of burial, rather than who had a right to bury the deceased in a particular way or in a particular burial site of cultural or religious significance.
- 14.65 The source of the proposition that the executor has not only a duty but also a right in the body, which could defeat the role of others who may have been close to the deceased, is said to be the 1882 case *Williams v Williams*.<sup>633</sup> In that case the deceased wanted to be cremated, which was unlawful in England at the time, so he asked his friend to cremate his body in Italy. She did so, but only after exhuming the body from its original location, where it had been buried by the man's wife and children. When the friend tried to recover the cost of the cremation from the man's estate, the case came before the courts. Kay J concluded that the deceased's friend could not recover from the estate because "the executors are *entitled to the possession* and are responsible for the burial of a dead body".<sup>634</sup>
- 14.66 Whether the executor's financial liability for burial properly extends to a right of decision as to the form or location of burial has been much debated.<sup>635</sup> However, despite misgivings as to

627 Conway "Burial Instructions and the Governance of Death", above n 624, at 425-427; see also *Takamore v Clarke* (SC), above n 526, at [182] per William Young J.

628 Tomas "Who Decides where a Deceased Person will be Buried – Takamore Revisited", above n 545, at 85-86.

629 *R v Price* (1884) 12 QBD 247 at 250.

630 *R v Stewart* (1840) 12 A& E 773 at 779.

631 *Ambrose v Kerrison* (1851) 10 CB 776, 138 ER 307; *R v Vann* (1851) 169 ER 523.

632 William Blackstone *Commentaries on the Laws of England: a reprint of the first edition with supplement: Vol II* (Dawsons of Pall Mall, London, 1765) at 508.

633 *Williams v Williams* (1882) 20 Ch D 659.

634 At 664 (emphasis added).

635 See for example the comments of William Young J in *Takamore v Clarke* (SC), above n 526.

its authoritativeness, *Williams v Williams* continues to be cited as the foundational case for the common law rights of the executor. Those rights are now well established in most common law countries including, in the form set out in *Takamore v Clarke*, New Zealand.<sup>636</sup>

### The administrator of the deceased

- 14.67 While the executor rule became well established, courts encountered difficulties dealing with disputes in which the deceased had appointed no person to the role of executor before they died – usually because they had left no will. The response was to identify the person who had the right to administer the deceased’s property in the absence of a will, and to treat that person as also having the right of decision in respect of the body of the deceased. That approach has been applied in recent English<sup>637</sup> and Australian cases.<sup>638</sup> The Supreme Court has suggested it should apply in New Zealand.<sup>639</sup>
- 14.68 An administrator is appointed by the Court after a person dies without an executor or without a will. The administrator carries out the duties towards the estate which would otherwise have been carried out by the executor. The person who applies for administration is often someone close to the deceased, like a spouse or a child or someone who is entitled to benefit from the estate.
- 14.69 The order of entitlement to letters of administration is usually set out in a succession law statute, which addresses how the estate of deceased persons are dealt with in the event that they die intestate (without leaving a will).<sup>640</sup> In the case of New Zealand, the general order of priority for a grant of administration in case of intestacy is set out in r 27.35 of the High Court Rules.<sup>641</sup> The order is:
- the surviving spouse or civil union partner (unless a separation order is in place)<sup>642</sup> or de facto partner (excluding a “relationship of short duration” as defined in section 2 of the Property (Relationships) Act 1976, unless one of the relevant exceptions applies);<sup>643</sup>
  - the children of the deceased (including adopted children under the Adoption Act 1955) or their grandchildren, where the deceased’s children have died during the lifetime of the deceased;
  - the parent or parents of the deceased;
  - brothers and sisters “of full or half blood”, or their children, where the brother or sister has died during the lifetime of the deceased;
  - grandparents; and
  - uncles and aunts “of full or half blood”, or their children, where the uncle or aunt has died during the lifetime of the deceased.
- 14.70 It is not necessary for the person in question to actually have been granted letters of administration, merely that they have the highest legal entitlement to them. In such cases the

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636 See *Murdoch v Rhind*, above n 526.

637 *Burrows v HM Coroner for Preston*, above n 613.

638 *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Meier v Bell* Vic Sup Ct 4518/1997, 3 March 1997; *Dow v Hoskins*, above n 607.

639 *Takamore v Clarke* (SC), above n 526, at [145].

640 See in New Zealand the Administration Act 1969, s 5.

641 The Court did not discuss possible use of the order of priorities in Te Ture Whenua Maori Act 1993 for administering the estate of a Māori deceased. See ch 16 at [16.53].

642 Under the Matrimonial Proceedings Act 1963 or the Family Proceedings Act 1980.

643 Where the Court is satisfied there is a child of the de facto relationship, or the partner has made a substantial contribution to the de facto relationship; and the Court is satisfied that not being entitled to succeed on the intestacy would result in “serious injustice” to the partner: Administration Act 1969, s 77B(2).

person may be referred to as the potential, rather than the actual, administrator of the deceased. There are also examples of cases where letters of administration have been granted for the sole purpose of conferring a right of decision regarding the burial of a body.<sup>644</sup>

- 14.71 Determining burial disputes according to the entitlement to letters of administration has been critiqued. We discuss those criticisms in chapter 15.

### Other relevant interests and rules

#### *“No property in a body”*

- 14.72 The common law rights of the executor developed against a background of another significant common law rule: the rule that the common law recognises no property in a dead body.
- 14.73 The proposition that a dead body cannot be a source of enforceable property rights (such as a right of ownership) was said to have been first set down in English common law in *Hayne’s case*,<sup>645</sup> although there is doubt about whether *Hayne’s case* in fact stood for this proposition. Nonetheless, by the middle of the 19th century the “no property” rule was a well-established and accepted part of the common law.<sup>646</sup> Over the course of the development of the common law, the no property rule has spread to a number of other common law countries, including New Zealand.
- 14.74 Legal scholars continue to debate the policy and principled underpinnings of the no property rule and why, given that today it is subject to significant qualifications and exceptions, the no property principle nonetheless continues to survive, and indeed continues to form the starting point for all discussions about legal control of the body.<sup>647</sup> One reason may be that the deceased human body is regarded in nearly all societies and cultures as being vested with a sacred or semi-sacred nature and more than just a “thing” which can be subject to property concepts such as ownership, possession and sale.<sup>648</sup> The survival of the no property rule may illustrate a persistent desire to avoid degrading the body by associating it with principles of commodification, which tend to infuse lay understandings of property.<sup>649</sup>

#### *Status of the deceased’s wishes*

- 14.75 Flowing from the no property rule is the fact that at common law, the wishes of the deceased are said to have no legally binding effect.<sup>650</sup> Hence, while the executor is expected to take account of the views of the deceased, he or she is not legally bound to carry them out. What this means is that, while the deceased can make a will which binds their survivors to deal with their property in a certain way, they cannot leave legally binding directions about what should happen to their body; for instance, that they would like it to be cremated, or that they would like particular funeral rites observed.<sup>651</sup> While in practice many people may include such directions in their will, and usually these will be observed, in a strict legal sense they have no binding status. This

644 See *Buchanan v Milton* [1999] 2 FLR 844 (Fam); *Burrows v HM Coroner for Preston*, above n 613, as cited in *Takamore v Clarke* (SC), above n 526, at [206] per William Young J.

645 *Hayne’s case* (1614) 77 ER 1389.

646 Prue Vines “The Sacred and the Profane: The Role of Property Concepts in Disputes about Post-Mortem Examination” (Working Paper, University of New South Wales, 2007) at 3.

647 See Eli Byron Stuart Ball “Property and the human body: A proposal for posthumous conception” (2008) 15 JLM 556.

648 Prue Vines, above n 646.

649 See Alexandra George “Is ‘Property’ Necessary? On Owning the Human Body and its Parts” (2004) 10 Res Publica 15.

650 *Williams v Williams*, above n 633, at 665.

651 Conway “Burial Instructions and the Governance of Death”, above n 624, at 62–67.

is also the case in New Zealand, although the executor is expected to take the deceased's wishes into account.<sup>652</sup>

### *The need for "timely disposal"*

14.76 At the time of evolution of the executor rule, it was claimed that there was a pragmatic need to ensure that unburied bodies did not cause a public health risk.<sup>653</sup> Today modern methods of refrigeration mean that bodies, if handled correctly, do not cause a public health risk. But it is often said that timely disposal is still required because it respects the body of the deceased, their family, and the wider community.<sup>654</sup>

## LITIGATION AND COURT PROCEDURE

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14.77 In practice, the process by which disagreements are resolved may unfold with little or no involvement by the executor. Disagreements may be resolved well before they reach court. However, it is still possible that one of the parties may bring court proceedings.

14.78 In this part we summarise the jurisdiction of the High Court following *Takamore v Clarke* and give some indication of what may happen if a case comes before the New Zealand High Court in future. The procedure has not yet been settled, but this is a summary of how we understand it might operate based on comments of the Supreme Court in *Takamore v Clarke*. It will depend on how the courts apply the common law in these kinds of proceedings and how it develops as cases come before the courts in future.

### The High Court's jurisdiction

14.79 The majority in the Supreme Court were not explicit as to the jurisdiction under which these proceedings would be brought. Elias CJ proceeded on the basis that the High Court has inherent jurisdiction over these matters.<sup>655</sup> The possibility that the High Court has inherent jurisdiction in this regard has also been discussed in *Re Jones (deceased)*<sup>656</sup> and *Re JSB*<sup>657</sup> and raised as a possibility in *Watene v Vercoe*.<sup>658</sup> Another possible form of proceedings may be an application for declaratory judgment under the Declaratory Judgments Act 1908, although that Act is not aimed at dealing with the kind of factual issues that burial disputes raise.

### Procedure

14.80 It appears that in future the High Court could be asked to determine a burial dispute in a range of circumstances, including:

- where there is an executor who has made a decision which other parties disagree with;
- where there is an executor who has declined to exercise their right of decision, so nothing is happening; and
- where the deceased died without having appointed an executor but two or more of their survivors, who may also be entitled to a grant of letters of administration, are contesting the right to decide.

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652 *Takamore v Clarke* (SC), above n 526, at [156].

653 See *R v Newcomb* (1898) 2 CCC 255 as cited in Conway "Burial Instructions and the Governance of Death", above n 624, at 13.

654 Heather Conway "Dead, but not buried: bodies, burial and family conflicts" (2003) 23 Legal Studies 423 at 426.

655 *Takamore v Clarke* (SC), above n 526, at [7].

656 *Re Jones (deceased)* [1973] 2 NZLR 402 (SC).

657 *Re JSB*, above n 603.

658 *Watene v Vercoe*, above n 538.

14.81 There could be a request for urgent orders to stop a burial from going ahead.

*An application to review an executor's decision*

14.82 The Supreme Court has said that an “aggrieved person” can commence proceedings in the High Court to challenge the executor’s decision. If the High Court is satisfied that the decision was inappropriate, it would have the power to make any orders necessary, including conferring the right to decide on someone else.<sup>659</sup>

14.83 The Supreme Court also said that the High Court should review the substance of the decision.<sup>660</sup> In practice, the threshold for “re-making” the decision of the executor is still likely to be high. The grounds for review have not yet been made clear. At least until a body of case law develops, it can be expected that the High Court will continue to exercise a significant margin of deference to an executor’s decision in future court proceedings.

14.84 It has been said that the High Court should examine the appropriateness of the executor’s decision on a case-by-case basis, taking into account the circumstances of the particular dispute. In a dispute over burial location the Supreme Court has said that the High Court should assess “the nature and closeness of the relationship of the deceased with each family and each location at the time of death”.<sup>661</sup> Aside from this, there is little New Zealand case law discussing factors the Court should take into account, although it might draw on factors taken into account by overseas courts in similar cases.

14.85 It has been noted that if an executor’s decision is challenged prematurely (perhaps in an effort to circumvent that decision) the applicant will bear the costs of a failed application.<sup>662</sup> This means that the timing of the application to review the executor’s decision may be critical. Applying too early, before the executor has made a decision, could cause the application to fail; however, once the executor has made a decision, the third party may need to institute proceedings promptly before that decision is carried out.

*An application for the right to make a burial decision where there is no executor*

14.86 The Supreme Court has suggested that if there is a burial dispute in which there is no executor, the right could be conferred on the person with the best claim to administer the estate. The Supreme Court’s endorsement of this approach, while not binding, provides a blueprint for the resolution of future disputes where there is no executor (which so far has not arisen in New Zealand).<sup>663</sup> It has been suggested that New Zealanders tend to take a relaxed approach towards leaving a will, so the issue of extending the executor rule to administrators is one that the courts could face in the future.<sup>664</sup>

14.87 In such proceedings, the High Court would have to consider who has the best entitlement to the grant of letters of administration, based on the order contained in the High Court Rules. The Supreme Court said that the High Court would not be bound to confer the right in that specific

659 *Takamore v Clarke* (SC), above n 526, at [160]–[162].

660 At [162].

661 At [167].

662 At [160].

663 In *Takamore v Clarke* (SC), above n 526, the Court’s comments on this point were obiter because they were not directly relevant to the resolution of case before the Court. See *Re JSB*, above n 603, in which the High Court considered whether to make orders to manage the risk of dispute upon the imminent death of a young child. The judgment included some discussion of the grant of letters of administration in intestate burial disputes at [26] and [62]. See also the 1988 decision *Re Tupuna Maori* where it was noted that letters of administration may be granted for a number of purposes; in that case it was to enable the likely descendant of the deceased to recover the head of the deceased from the possession of London auctioneers: *Re Estate of Tupuna Maori* HC Wellington P 580/8, 19 May 1988.

664 “New website launched to support New Zealanders’ will to live” *Scoop* (29 July 2013) < [www.scoop.co.nz](http://www.scoop.co.nz) > .

order but it might only be appropriate to depart from it in extraordinary circumstances.<sup>665</sup> Without further development of the common law it is difficult to know when that might be, but sufficient reason might be if the first-named person in the hierarchy has been found criminally responsible for the death of the deceased,<sup>666</sup> or if the Court is satisfied that the first-named person is estranged from the deceased.<sup>667</sup>

- 14.88 It would not be necessary to actually make a grant. Usually a grant of letters is not made until several days after the death and cannot by law be made earlier than 10 working days from the date of death, although the Court can shorten the time period.<sup>668</sup> The proceedings could be heard separately.

#### *An application to make a decision where the executor has declined to do so*

- 14.89 The High Court may also be asked to determine a case where there is an executor who has declined to make the burial decision and the parties are in dispute but cannot resolve it by reference to the executor's rights. This arose in the Australian case *Keller v Keller*.<sup>669</sup> If that happened in New Zealand it may be that the Court would begin by identifying the person with the best claim to administer the estate, as discussed above, and treat him or her as having the right of decision.

#### *An urgent application for an injunction*

- 14.90 Sometimes the High Court may be called upon to make urgent orders in relation to a dispute over a body. An application under the High Court's inherent jurisdiction may be necessary if one party to the dispute has taken the body, and urgent interlocutory orders are required to prevent disposal proceeding or for police to take custody of the body. The order will have the effect of placing a stay on the matter until the substantive question of who should control disposal can be considered by the High Court. This scenario arose in the dispute over the body over James Takamore.

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665 *Takamore v Clarke* (SC), above n 526, at [148].

666 See for example *Scotching v Birch* [2008] All ER 265, in which the mother of the deceased, who had been found guilty of the murder of the deceased, was precluded from being granted letters of administration in a burial dispute between herself and the father. See also *Re JSB*, above n 603. The question was also covered in depth in Queensland Law Reform Commission *A Review of the Law in Relation to the Final Disposal of a Dead Body* (QLRC R69, 2011) at [6.131]–[6.195].

667 See for example in Minnesota, where the Court may order that the right passes upon a determination that the person on whom the right would normally devolve and the deceased were estranged at the time of death (defined as “having a relationship characterized by mutual enmity, hostility or indifference”): Minn Stat 2012 § 149A.80, subd 3.

668 High Court Rules, r 27.29(1).

669 *Keller v Keller* [2007] VSC 118, (2007) 15 VR 667.

# Chapter 15

## Reviewing the executor rule

### INTRODUCTION

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- 15.1 Following the majority decision of the Supreme Court in *Takamore v Clarke*, the executor rule – in the form in which it applies in New Zealand – is now a significant part of New Zealand common law on the resolution of burial disputes. In this chapter we ask whether that rule, and its proposed extension to administrators where there is no executor who can otherwise act, is an effective and principled means of resolving burial disputes in contemporary New Zealand society. If the law is likely to be called on more frequently,<sup>670</sup> it is worth ensuring that it works effectively and meets the needs of the public.
- 15.2 Our preliminary view is that the executor rule, even in its modified form, is incomplete and that it may not align with contemporary values and expectations. In this chapter we summarise issues with the executor rule, including:
- practical issues, such as where there is no executor who is able and willing to exercise the right of decision;
  - legal questions around the executor’s rights of decision; and
  - issues of principle, for example vesting the right to decide in a single person who may have no or only a distant relationship with the deceased and the deceased’s family.
- 15.3 We also examine issues with the common law administrator framework being used as a decision-making tool in cases where there is no executor able or willing to act.

### PRACTICAL ISSUES WITH THE EXECUTOR RULE

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- 15.4 It is said that the executor rule is a desirable rule of law because it brings certainty and clarity to people who are in a burial dispute. If those people “accept or acquiesce” to the executor’s decision they may be less likely to become involved in court proceedings.<sup>671</sup> This will depend, however, on a number of conditions being fulfilled, including the parties in dispute being able to clearly identify the “person with authority to decide”; that person knowing they are entitled to make the decision and doing so; and the other parties acquiescing to or accepting their decision, rather than mounting a legal challenge.
- 15.5 Those ideal conditions might not always exist. For instance, if the deceased never made a will, at the time of their death no one will occupy the position of executor. Or the will might not be able to be located, so the executor cannot be formally identified. The disposal arrangements could then be open to challenge by an executor who later claims not to have acquiesced or agreed to the arrangements.<sup>672</sup> Situations also arise where it might seem clear as a matter of fact who is the person with authority to decide but there are questions as to their authority under law to exercise the right of decision – for instance, if a disagreement arises between co-executors who

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670 See ch 13 at [13.7].

671 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [153] per Tipping, McGrath and Blanchard JJ. See also at [207] per William Young J.

672 At [67] per Elias CJ.

have equal rights to decide, or if the person with authority to decide has been criminally charged with causing the death of the deceased.<sup>673</sup>

- 15.6 The nominated executor may accept the grant of probate and carry out their duties towards the estate, but may decline to make a decision as to disposal of the body. Professional executors, for example, might be expected not to exercise the right of decision with regard to the body and may instead encourage the parties in disagreement to resolve it.<sup>674</sup> This seems appropriate in principle, but may leave survivors in dispute with no clear pathway to resolution and may undermine the intended administrative efficiency of the executor rule.
- 15.7 Some common law courts have resolved these practical problems by recognising the right of decision as vesting in the person who is next highest ranked on the statutory hierarchy of potential administrators of the estate.<sup>675</sup> However, in New Zealand there is little case law on this. Also, further questions about the administrator's authority arise (see below).

## LEGAL QUESTIONS

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- 15.8 The executor rule, although clarified to an extent in *Takamore v Clarke*, is still a relatively undeveloped legal rule in New Zealand. In the absence of statutory reform, the establishment of a body of court precedent will be necessary before many of the legal questions about the operation of the executor rule may be resolved.
- 15.9 For instance, it is unclear whether a nominated executor has authority to arrange final disposal before the will has been probated, particularly if a third party has applied for recall of probate for the express purpose of gaining control over the burial decision.<sup>676</sup> In that situation it might be inappropriate for the executor to proceed. On the other hand, being required to wait until probate is granted might undermine the efficiency of the executor rule, as a person's will is often not probated until some time after their death.
- 15.10 Another question concerns the point at which the executor's right becomes "operative" in the terms discussed by the Supreme Court. At present it seems that executors must determine for themselves the point at which the disagreement has become sufficiently serious that it is correct for them to act on their right of decision.<sup>677</sup> Acting too early could lead to a claim that at the relevant time they had no legal right to proceed.
- 15.11 The time at which the executor determines their rights have become operative could also become crucial in a tikanga Māori setting. In that setting it will be important to devote time to discussing the appropriate burial location and for a possibly large number of people to express their views. The point at which the executor may appropriately determine that "nothing is happening" or "arrangements have broken down" is likely to be less clear in such a setting, particularly for executors unfamiliar with tikanga. But once the executor determines that it is

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673 See for example *Hartshorne v Gardner* (the two disputing parties were parents of the child and had equal rights to a grant of letters of administration); see also *Scotching v Birch*.

674 For example, it is the policy of the Public Trustee of Queensland to leave appropriate arrangements for the disposal of the body to those closest to the deceased: Queensland Law Reform Commission, (R 69, 2011), at 76. See also *Keller v Keller* [2007] VSC 118, [2007] 15 VR 667 in which the sole and independent executor declined to make a decision as to burial.

675 See for example *Burrows v HM Coroner for Preston* [2008] EWHC 1387, [2008] 2 FLR 1225 (QB); *Calma v Sesar* [1992] 2 NTLR 37; and *Saleh v Reichert* (1993) 104 DLR (4th) 384, 50 ETR 143.

676 Probate is the certificate granted by the High Court to confirm that the will of the deceased has been proved and registered in the Court and that a right to administer their estate has been granted to the executor proving the will: Administration Act 1969, s 5(1). See *Tapora v Tapora* CA 206/96, 28 August 1996 as discussed in ch 14. See also *Abeziz v Harris Estate* [1992] OJ No 1271 (ONGD) as cited in *Takamore v Clarke*, above n 671, at [66] per Elias CJ.

677 *Takamore v Clarke*, above n 671, at [154].

appropriate to exercise their right of decision, they are then entitled to have regard to the need for burial without “undue delay”.<sup>678</sup> That could lead to tikanga discussions being cut short.

- 15.12 Any uncertainty in the executor rule is also likely to cause problems for third parties who might be involved in burial arrangements, such as funeral directors who are asked to proceed with burial or cremation in circumstances of dispute or disagreement.<sup>679</sup> A coroner who is releasing a body after a post-mortem might face difficulty in knowing who he or she should release a body to if the family of the deceased are in dispute.<sup>680</sup>

## PROBLEMS OF PRINCIPLE WITH THE EXECUTOR RULE

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- 15.13 Aside from the practical difficulties, the executor rule also raises problems of principle.
- 15.14 It cannot be expected that in every burial dispute the executor will necessarily have a strong *principled* claim to determine burial. The position of executor is not one based on the executor’s relationship with the deceased or the family of the deceased. It is primarily an administrative role, designed to ensure that after death, the deceased’s property is dealt with. The executor will not necessarily have detailed knowledge of the deceased’s wishes for disposal, any special competency to manage the dispute, or be in a good position to take into account family interests. For this reason William Young J in *Takamore v Clarke* suggested that there is little logic to the executor rule.<sup>681</sup>
- 15.15 William Young J also noted that *Williams v Williams*, the historical English authority for the legal right, concerned the executor’s financial obligations to cover the costs of disposal and the case should be limited in that respect. It should not be used as the authority for a rule conferring the right to control disposal on the executor as a matter of law, as against “close relatives who are also prepared to bury the deceased in an appropriate way”.<sup>682</sup> Heather Conway has critiqued the rule on similar terms, giving examples of case law in which the rights of family members who may have had a closer relationship with the deceased were displaced by the executor.<sup>683</sup>
- 15.16 Elias CJ, in *Takamore v Clarke*, emphasised that traditionally the responsibility for burial falls to family of the deceased. It is treated as a “shared responsibility” which “falls to be exercised according to the circumstances”.<sup>684</sup> She also noted that relevant statutory provisions relating to care and custody of the body generally emphasise the role of family in the post-death period.<sup>685</sup>
- 15.17 Aspects of the executor rule do not sit well with how burial decisions would be reached under tikanga Māori. While the executor rule emphasises administrative efficiency, with the focus on ensuring disposal in a timely manner, tikanga emphasises discussion and full airing of the issues around where the body should lie before the ultimate decision is reached. Those different

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678 At [156].

679 In the United States, funeral directors are reluctant to follow instructions in an unprobated will if they conflict with the preferences of the biological family: Tanya Hernández “The Property of Death” (1998–1999) 60 U Pitt L Rev 971 at 1020. See also the statute of Minnesota which provides that funeral directors may, in the absence of knowledge to the contrary, rely on burial instructions given by certain family members of the deceased who represent they are the sole survivors of the deceased: Minn Stat 2012 § 148A.80 subd 5.

680 Coroners Act 2006, s 42. See *Burrows v HM Coroner for Preston*, above n 675, where the Court noted that coroners need clarity on these issues.

681 *Takamore v Clarke* (SC), above n 671, at [203] per William Young J.

682 At [202]–[203].

683 Including *Murdoch v Rhind* [1945] NZLR 425 (in which the brother, who was executor of the deceased, prevailed over the deceased’s spouse) and *Grandison v Nembhard* [1989] 4 BMLR 140 (an English case in which the executor was entitled to bury the deceased in Jamaica, notwithstanding a request from the deceased’s daughter for her father to be buried in the United Kingdom): Heather Conway “Dead, but not buried: bodies, burial and family conflicts” (2003) 23 Legal Studies 423 at 427.

684 *Takamore v Clarke* (SC), above n 671, at [90].

685 Such as the Burial and Cremation Act 1964, s 46E; Coroners Act 2006; Human Tissue Act 1998, s 12; and the Maritime Transport Act 1994, s 25.

cultural practices under tikanga have, to an extent, been taken into account by the courts in their development of the executor rule in New Zealand common law.<sup>686</sup>

- 15.18 More recently, a growing trend in some quarters suggests that it is the individual themselves who should have control over their body after death, and that the executor should be legally bound to follow their wishes. We return to that discussion in chapter 16.

## THE ADMINISTRATOR FRAMEWORK AS A DECISION-MAKING TOOL

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- 15.19 It is difficult to make the executor rule work effectively without extending it to administrators, so if the executor rule remains part of New Zealand common law, it is likely that the potential administrator of the deceased's estate will continue to be "co-opted" to help make the executor rule work.<sup>687</sup> Three members of the Supreme Court favoured this approach for reasons similar to those reasons supporting the executor rule; because it is said to be a certain and administratively efficient means of determining a burial dispute.<sup>688</sup>

- 15.20 However, the administrator framework itself raises issues, although of a slightly different nature to those associated with the executor rule.

- 15.21 While it is true that the people listed in the statutory hierarchy from which the administrator is identified are "likely to be those with closest family connections to the deceased",<sup>689</sup> this does not necessarily make them the most appropriate person to decide in all cases. The order of priority for administering the estate is usually spelt out in terms of closeness to the deceased based on blood relationships, but this will not necessarily reflect the closeness of the deceased's relationships in life or at the time of their death. Also, the list of relationships is mainly limited to those based on kin, and so excludes any person who might have some principled claim to make the decision but was unrelated to the deceased.<sup>690</sup>

- 15.22 William Young J in *Takamore v Clarke* thought that resolving burial disputes "through the proxy of deciding who the administrator should be" was not fit for purpose, noting that:<sup>691</sup>

An administrator will not usually have been entrusted by the deceased with the making of burial arrangements. The occasion for an administrator to make a decision as to burial will usually only arise where letters of administration have been sought as a way of resolving a pre-existing dispute.

- 15.23 Conway and Stannard suggest that such an approach is used by judges in common law jurisdictions as a means of avoiding engaging fully with the underlying issues, because they are able to identify a person who should make the decision without opening the "Pandora's box" of emotions and family tensions that burial disputes raise.<sup>692</sup>

- 15.24 Vines writes about the use of the administrator framework in Australia, citing several cases in which it has led to courts excluding consideration of strong cultural or spiritual imperatives associated with the burial decision.<sup>693</sup> This framework has operated to the detriment of indigenous Australians, who are more likely to die without a will but for whom cultural and

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686 See *Clarke v Takamore* [2010] 2 NZLR 525 (HC) at [91]–[102]; *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [254]–[257]; *Takamore v Clarke* (SC), above n 671, at [164].

687 As explained at [14.67].

688 *Takamore v Clarke* (SC), above n 671, at [145].

689 At [146].

690 Frances H Foster "Individualized Justice in Disputes over Dead Bodies" (2008) 61 Vand L Rev 1351 at 1393–1398.

691 *Takamore v Clarke* (SC), above n 671, at [205] and [206].

692 Heather Conway and John Stannard "The Honours of Hades: Death, Emotion and the Law of Burial Disputes" (2011) 34(3) UNSW Law Journal 860 at 882.

693 Prue Vines "Consequence of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights" (2004) 8 AILR 1 at 5–8.

spiritual imperatives related to burial are particularly important.<sup>694</sup> Thus in cases such as *Meier v Bell*,<sup>695</sup> *Burrows v Cramley*<sup>696</sup> and *Calma v Sesar*,<sup>697</sup> even where claims were made based on culture and religion, the deciding factor was the entitlement of the administrator under succession law hierarchies. In *Meier v Bell*, the Court said that cultural concerns may be disregarded in the application of this framework:<sup>698</sup>

... the manner of resolution of a problem such as the present must be consistent. ... There cannot be departure from principle in order to accommodate particular factual disputation, whether it be founded on matters religious, cultural or of some other description.

- 15.25 That is not a stance that has been adopted by New Zealand courts,<sup>699</sup> and a different approach has also been taken in other Australian cases including *Jones v Dodd*.<sup>700</sup> Nonetheless, it may be argued that the administrator framework places a high emphasis on dealing with disputes dispassionately and in a “legal” sense, and this may inadvertently obscure or prevent judges from engaging with the underlying values and cultural issues that such disputes raise, and which are of real and valid concern for the parties involved.

## THE CASE FOR STATUTORY REFORM

- 15.26 In our view the main problem with the existing common law rule is that the body of law and the procedures around it are under-developed and inaccessible to the wider public. Any gains in certainty or clarity which the rule could otherwise bring to parties in dispute are likely to be affected by that. There may be people who anticipate a dispute arising upon their death but are unaware of the executor’s role in managing that dispute. Executors themselves may be unaware of their responsibilities in this context, and will not necessarily have detailed knowledge of the deceased’s wishes for disposal, any special competency to manage disputes in the post-death period, or be in a good position to take account of family interests.
- 15.27 There may be a sense that because burial disputes come before the courts relatively infrequently, the executor rule is an adequate means of dealing with them quickly on the rare occasions they seem to arise. But the law must also permit those who wish to resolve their disputes outside of court – to “arrange their affairs in the shadow of the law”, or to use the law as the framework against which they engage in the discussion as to the burial matters – to do so, based on a clear understanding of what the law actually is. The law in this area should support people’s needs and expectations at this time, to allow grief and mourning processes to play out.
- 15.28 If, as seems to be the case, the executor rule has been surpassed by social and legal developments in New Zealand, it may be argued that the matters which are currently addressed through the executor rule (and the administrator framework) should be replaced by new statutory provisions that are transparent, fair, accessible, and workable. Exactly how any new statutory provisions might work is an issue we explore in the next chapter.

694 Vines observes that intestacy is more likely among socio-economically disadvantaged sectors of the population, either because they feel they have no assets to leave or because of limited access to the knowledge or assistance needed to make a will: above n 693, at 8.

695 *Meier v Bell* Vic Sup Ct 4518/1997, 3 March 1997. See also the comments of the Law Reform Commission of Western Australia that, in burial disputes involving aboriginal persons, “the benefits of the current common law approach (in particular, the promotion of judicial expediency in resolving burial disputes) may be unnecessarily forfeited by legislative direction to consider cultural and spiritual values”: Law Reform Commission of Western Australia *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture* (2006, Final Report) at 260.

696 *Burrows v Cramley* [2002] WASC 47.

697 *Calma v Sesar* [1992] 2 NTLR 37.

698 *Meier v Bell*, above n 695, at 9.

699 *Takamore v Clarke*, above n 671, at [72]–[79] per Elias CJ.

700 *Jones v Dodd* [1999] SASC 125.

# Chapter 16

## Developing a new statutory framework

### INTRODUCTION

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- 16.1 In chapter 15 we suggest that replacing the common law executor rule with new statutory provisions may make the law more accessible and effective for those in a burial dispute, and introduce greater clarity and certainty as to the legal position. In this chapter we set out the possible options for a new statutory decision-making methodology that might replace the executor rule.
- 16.2 Because this is a first principles review of the law, the cultural values and perspectives informing people's view of death and how it should be responded to must be clearly articulated within any reform options put forth. Our discussions with the Māori Liaison Committee have served to confirm this, as have our discussions with other cultural and religious groups. These cultural perspectives are deeply ingrained, as Ruth McManus notes:<sup>701</sup>
- Cultural identity is always in the making through people's everyday habits, practices and institutions. This is never more so than in death. The distinctive features of a culture can best show themselves in death, because the ways that people bid farewell to and inter their dead are a well-worn path for asserting what is held dear to the departed and their nearest and dearest.
- 16.3 A rule by which an executor has the right of final decision in these matters reflects a particular cultural perspective having its origins in English common law. That legal tradition has tended to value well-defined legal rights and obligations, consistency and certainty of judicial decision-making and timely disposal of the deceased's body.<sup>702</sup> These are valuable objectives. But it can also be argued that the executor rule is not a well-understood rule of law; that it may have been overtaken by social and legal developments, such as New Zealand's increasing cultural diversity and the changing place of Māori customary law in the legal system; and that as a result of these developments, a new approach is required.
- 16.4 In any new approach, the increasing diversity of New Zealand and the rights of minority groups must be accommodated. The role of Māori customary law must be reflected in any new approach that is developed. At the same time our reform proposals must be realistic and able to operate within a unitary legal system.

### Overview of the chapter

- 16.5 This chapter is intended to enable people to give their views with an awareness of the different cultural perspectives involved and the cultural, policy and legal implications of the various options for reform.

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701 Ruth McManus *Death in a Global Age* (Palgrave Macmillan, Basingstoke, Hampshire, 2013) at 122.

702 Heather Conway and John Stannard "The Honours of Hades: Death, Emotion and the Law of Burial Disputes" (2011) 34(3) UNSWLJ 860 at 881-885.

- 16.6 We begin by setting out, at [16.9] to [16.26], the range of matters that may be relevant to a person making a burial decision. Not everyone will place the same value on the same matters. That is important to keep in mind when later we discuss the possible design of a new statutory regime. It must be flexible; that is, able to accommodate instances of disagreement and dispute where all involved take a different view as to which factor or factors should take priority in the burial decision.
- 16.7 We then pose a range of questions designed to help determine the general outline of a new statutory regime.<sup>703</sup> The first question is whether our law should recognise a right to determine what happens to a person's body when that person dies. We refer to this as a "statutory right of decision". Whether such a right should form part of our law is open to question. We examine the arguments that can be made both ways at [16.27] to [16.39].
- 16.8 If there is a widely-held view that the New Zealand's burial legislation should recognise such a right of decision, there are consequential policy questions relating to who should be entitled to exercise that right, how it should be exercised, and when it becomes operative. We explore these at [16.41] to [16.81].

### **MATTERS THAT ARE RELEVANT IN A BURIAL DECISION**

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- 16.9 The matters that inform a burial decision will vary greatly for different people. They may also vary depending on whether we are considering our own death or that of someone close to us.

#### **The preferences of the deceased**

- 16.10 If we consider the interests of the deceased person, for some people it might matter very much that their burial decision be a reflection of the control they exercise over their bodies while alive. They might want to be sure that, if they have expressed a preference for the handling of their body, it is respected after they die. Rosalind Atherton observes that the extent to which an individual can control what happens to their body after death is an expression of their individual autonomy.<sup>704</sup>
- 16.11 Some commentators have argued that adequate recognition of a person's individual autonomy requires that their wishes for their body, if they have been expressed, must be carried out. Thus Heather Conway says that:<sup>705</sup>
- If an individual stipulates a certain form of burial while alive, this should be respected as part of their overall autonomy, with the right to self-determination once again being paramount. The deceased should be the only person to decide what is in his or her best interests and, having made a conscious decision to this effect, ought to dictate the form of burial.
- 16.12 According to Tanya Hernandez such views reflect a shift in attitude towards death and dying, away from the traditional focus on family and towards a focus on the autonomous individual.<sup>706</sup> This "modern autonomy trajectory" began with the enactment of legislation enabling individuals to decide whether to donate their bodies after death.<sup>707</sup> It has now been argued that the same position should apply to a deceased's wishes for final disposal:<sup>708</sup>

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703 See generally [16.27]–[16.82].

704 Rosalind Atherton "Who owns your body?" (2003) 77 ALJ 178 at 184.

705 Heather Conway "Dead, But Not Buried: Bodies, Burial and Family Conflicts" (2003) 23(3) LS 423 at 438.

706 Tanya K Hernandez "The Property of Death" (1999) 60 U Pitt L Rev 971 at 976.

707 At 1022.

708 Heather Conway "Burial Instructions and the Governance of Death" (2012) 12(1) OUCIJ 59 at 73.

[S]ituations already exist in which an individual may make autonomous choices which transcend death, such as posthumous reproduction and organ donation. If decisions made in life about the fate of the body can already take effect after death, why should we ignore the burial wishes of the deceased?

- 16.13 Analogies have also been made to succession law, which enacts an individual's post-mortem wishes for the distribution of their property:<sup>709</sup>

If by enforcing a will what we care deeply about is respecting the decedent's wishes and autonomy, then it is not clear why this principle should be defeated in situations where the decedent's wishes are concerned with the disposal of her own body. On the contrary, it seems unambiguous that a person's body is one of the most precious things about which she cares, certainly more than her real property.

- 16.14 A person's cultural and religious beliefs may also influence the degree of importance they place on having their burial wishes treated as paramount. For instance, if a person has converted to another religion during their lifetime against their family's wishes, it might be very important to them to be able to control their own burial rather than leave it to be carried out in accordance with their family's religious tradition. Or, if an individual has married someone from a different culture or religion, that person might nonetheless want to ensure that the cultural or religious beliefs of their family of origin dictate or find expression within their burial.
- 16.15 English courts have legitimated the deceased's own interest in their burial by reference to international rights instruments that have been incorporated into United Kingdom domestic law. The European Convention on Human Rights, incorporated into English law via the Human Rights Act 1998, guarantees the right to respect for private and family life and the right to freedom of thought, conscience and religion.<sup>710</sup> In the *Takamore v Clarke* proceedings the Court of Appeal majority noted that emerging jurisprudence around these rights "may allow greater effect to be given to the cultural, spiritual and religious beliefs, practices and traditions of the deceased and his or her family".<sup>711</sup>
- 16.16 At the same time, it will not be important to everyone that they are able to dictate what happens to their body after they die. For some people autonomy over their bodies and their decisions might be important while living, but they might be less concerned about their wishes for their dead body, and content to leave it to their survivors to decide.

### The needs of survivors

- 16.17 Death is not just about the deceased. Survivors also have a vested interest in the burial decision. Heather Conway and John Stannard note that the impact of death on the family as an institution in its own right can be significant, as death brings disruption of family patterns. The family's involvement in funeral arrangements can help the family to "realign" in the absence of the deceased.<sup>712</sup> It also provides a focal point for the expression of feelings of grief and pain.<sup>713</sup>

[A] funeral service addresses the emotional needs of a decedent's survivors by providing a socially acceptable outlet for feelings of grief and pain. Planning the funeral service also assists survivors in coming to terms with the loss and their grief ...

- 16.18 Survivors may have a range of motivations for being involved in the burial decision. People who were very close to the deceased in life might wish to have that relationship taken account of

709 Daniel Sperling *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge University Press, New York, 2008) as cited in Conway "Burial Instructions and the Governance of Death", above n 708, at 72.

710 See for example *Burrows v HM Coroner for Preston* [2008] EWHC 1387, [2008] 2 FLR 1125 (QB). See the discussion in Heather Conway "Dead, but not buried: bodies, burial and family conflicts" (2003) 23 *Legal Studies* 423 at 442.

711 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [238].

712 Conway and Stannard, above n 702, at 866–869.

713 Hernandez, above n 706, at 991.

in the way the deceased is farewelled and in the decision as to their final resting place. Some family members might want the deceased to lie in a place that is close and easy to visit, or in a place where the deceased will be surrounded by other family who have passed away. Others might see the ability to dictate burial arrangements as a way to claim or reclaim the identity of the deceased and mark them out as a member of their family or community.<sup>714</sup> Others might see it as very important to carry out the deceased's wishes because they equate this with giving respect to the deceased. Others might feel that being involved and having their voice heard will help them work through their grief.

- 16.19 Courts are becoming increasingly sensitive to the validity of claims made by family and survivors of the deceased to be involved in the burial decision. In *Jones v Dodd*, the South Australia Supreme Court made reference to:<sup>715</sup>

... the need to have regard to the sensitivity of the feelings of various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question.

- 16.20 In tikanga Māori the collective wishes of the whānau of the deceased are always considered alongside those of the deceased themselves. In *Takamore v Clarke*, Elias CJ took this aspect of tikanga into account, making reference to the rights guaranteed by the New Zealand Bill of Rights Act 1990:<sup>716</sup>

The Court has to consider the wider interests in the claim, which ... arise not out of the personal preferences of the living, but out of their obligation to the dead and to those still to come (including Mr Takamore's descendants), the connections with whom will be diminished in cultural terms by burial away. ... decisions in such matters affect the enjoyment of the culture of the hapū in a way which engages s 20 of the New Zealand Bill of Rights Act.

- 16.21 Families who are denied involvement in the burial arrangements, who feel they lack input into the decision, or who are required to carry out a burial in a manner to which they are fundamentally opposed may be inhibited in their grief and may find it difficult to gain closure.

### Conclusion: the need for flexibility

- 16.22 The number and range of matters that may be relevant to the burial decision and the number of people who may have a vested interest in that decision give some sense of the potential for dispute. They also illustrate the complex and difficult nature of the task of weighing up these relevant matters and attempting to arrive at some logical and reasoned decision as to who, if anyone, should have the final right of decision.

- 16.23 Courts that have been called upon to undertake this task have, understandably, struggled.<sup>717</sup> The difficulties were remarked upon in the Australian ashes dispute case *Leeburn v Derndorfer*, heard in the Supreme Court of Victoria:<sup>718</sup>

[C]ases such as the present stand at the intersection of a number of competing principles. These may be competing prescriptions and proscriptions of a cultural, social or religious nature, personal taboos, wider concerns as to public health and decency, the attitudes of the grieving family and friends, and the wishes of the deceased. Moreover, these competing pressures may be difficult to resolve, especially where they are based on feelings which are strongly held at a time of great emotional stress and which are difficult to justify, or even explain, in any rational way. ... It is an area of law where one can read

714 Conway and Stannard, above n 702, at 879–880, and discussed generally at 869–880.

715 *Jones v Dodd* [1999] SASC 125 at [51].

716 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [100].

717 See the discussion in Conway and Stannard, above n 702, at 881–896.

718 *Leeburn v Derndorfer* [2004] VSC 172 at [10].

in the reported decisions an anguish in the judges seeking to accommodate the concerns of those interested; and their embarrassment at having to deal, often in some haste, with bitter conflicts within families over the remains of a recently deceased relative or friend, which conflicts, although arising out of genuinely held feelings, are perceived as being unseemly.

- 16.24 We might then ask how all these matters can be included within a statutory regime which will, it is hoped, assist all those who are in a burial dispute while respecting the diversity of cultural and religious belief and personal and family interests that are involved. It may not be possible to construct a statutory regime in which all these factors can be given equal value in the range of possible disputes that could arise.<sup>719</sup>
- 16.25 The best approach, therefore, is to retain flexibility in the statutory regime. This may be achieved by setting out the broad principles in statute, keeping the terms of the statute open-textured in nature rather than overly prescribed, and making the courts available to decide these matters where parties cannot come to agreement between themselves. Courts would be able to deal with the diversity of matters that could arise in a burial dispute on a case by case basis, weighing them in the balance according to the interests and circumstances of the particular case, and having regard to what is required to do justice between the parties. Guiding statutory factors would assist the Court in that inquiry, and the Court must be accessible and its orders able to be made in a timely manner. We develop that discussion in chapter 17.
- 16.26 Despite the clear interest in retaining flexibility in any new statutory regime, we might also consider whether a particular statutory emphasis should be placed on any one of the following matters in a burial dispute:
- meeting the needs of close relatives to mourn and commemorate the deceased in a way they consider fitting;
  - giving effect to the wishes of the deceased, if they have been expressed, or at a minimum taking those wishes into account;
  - taking account of cultural or religious needs, such as reconnecting the deceased with a significant place and with their family lineage; and
  - ensuring that all those with an interest in the decision are asked for, or given an opportunity to express, their views.

## **A STATUTORY “RIGHT OF DECISION”?**

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- 16.27 Given the range of matters potentially relevant to a burial decision, and the need for flexibility, the question then is what should be the broad outline of any new statutory regime.
- 16.28 The starting point for the design of a new regime is whether to incorporate a statutory “right of decision”. Arguments can be made both ways. It might be thought that it is simply not appropriate to recognise such a right in the statutory regime, and that the most effective way to ensure that the full range of interests are taken into account is simply not to treat such a right as one recognised by New Zealand law. Alternatively, it might be thought that a statutory right of decision is a necessary tool to bring legal certainty to parties in dispute.

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719 Rosalind Croucher has observed that “a principle which accords paramountcy to the wishes of the deceased will detract from the process for the living”: Rosalind Croucher “Disposing of the Dead: Objectivity, Subjectivity and Identity” in Ian Freckelton and Kerry Peterson (eds) *Disputes and Dilemmas in Health Law* (Federation Press, Sydney, 2004) 324 at 332 as cited in *Takamore v Clarke* (CA), above n 711, at [213].

### Arguments against including a statutory right of decision

- 16.29 A right of control or decision over a body may raise notions of property or ownership that might not sit comfortably with the general public. We particularly note Māori unease over notions of ownership.<sup>720</sup> The degree of inconsistency in the law regarding the legal recognition of rights in the body demonstrates the complexity of the policy concerns and other interests involved.<sup>721</sup> The common law no property rule is subject to multiple exceptions and qualifications; it prevents people from making binding directions for their body in respect of some matters but not others.<sup>722</sup>
- 16.30 A statutory framework that sets down a right of decision in relation to burial matters may have a degree of artificiality. In the normal course of events decisions are reached not on the basis of a legal right but by family decision-making, and what is seen to be most appropriate by whoever is present and prepared to be involved at the time. This was noted in the Supreme Court decision in *Takamore v Clarke* by Elias CJ who observed that families “commonly attend to disposal of their dead” and often without reference to any rights of the executor.<sup>723</sup> A number of New Zealand statutes confer a role on family in relation to the deceased, perhaps indicating community values and expectations of the role of family in these circumstances.<sup>724</sup> It is arguable that the legal framework should reflect, as far as possible, actual practice, and if common practice is for family to decide in the manner that best suits them, the best approach may not be to recognise a statutory right to decision.
- 16.31 We also note that enacting a statutory right of decision, at least one that vests in an individual, may obscure the beliefs of those cultures including Māori, that treat the collective interest as equally important as the exercise of an individual’s right.
- 16.32 If it is thought inappropriate to include in statute a legally enforceable right of decision in relation to burial matters, burial legislation could simply state that the duty and responsibility of burying the deceased falls on “the immediate family” of the deceased, employing a broad definition of immediate family as found in some existing legislation. Section 86 of the Health Act 1956 would remain as a backstop provision, as it is now, to ensure that where no family is available to do that, the duty falls on the local authority, thereby ensuring that the bodies of all deceased persons would be properly buried.
- 16.33 Legislation could also provide that, where there is disagreement over the burial of a deceased person that is inhibiting that person’s right to a decent burial, the court must make an order for burial directions. Families would then be expected to reach the decision in the way they saw fit, with the court available to assist or to decide the matter where the family is in dispute. The case would come before the court with no person being treated as having a prior right of decision.

### Possible benefits of a statutory right of decision

- 16.34 The primary benefit of a statutory right of decision may be that it delivers legal certainty and control in those instances where someone does wish to exercise it, even if those instances rarely arise. Conceptually, it might be acceptable for such a right to be set down in statute but only to

720 Submissions to this effect were made to the Law Commission’s Coroners review: Law Commission *Coroners* (NZLC R62, 2000) at [217].

721 See for example Alexandra George “Is ‘Property’ Necessary? On Owning the Human Body and Its Parts” (2004) 10 Res Publica 15. A growing number of jurisdictions appear to grant individuals a right of control in their bodies through statutory donation regimes and through posthumous reproduction case law: see Hernandez, above n 706, from 1022 and Belinda Bennett “Posthumous Reproduction and the Meaning of Autonomy” (1999) 23 MULR 286.

722 The executor’s rights have had to be expressed as an exception to that rule, or as an ancillary right that exists for a limited time and purpose: see *Takamore v Clarke* (CA), above n 711, at [200].

723 *Takamore v Clarke* (SC), above n 716, at [83] per Elias CJ.

724 Including the Coroners Act 2006, the Human Tissue Act 2008, s 12 and the Maritime Transport Act, s 25. See *Takamore v Clarke* (SC), above n 716, at [39]–[47].

- be exercised as and when required. It would not be obligatory to exercise the right and it might not even be activated until the point at which there is disagreement or dispute.<sup>725</sup>
- 16.35 It is possible that many disputes arise because survivors do not know their legal rights and responsibilities towards the body. Stating those clearly in an Act might be a useful backstop position for people in discussion and could divert them from litigation. In the view of Kimberley Naguit, for instance, including a right of decision (which in her view should be vested in the deceased) would help eliminate disputes among survivors.<sup>726</sup> However, Griggs and Mackie note that in United States jurisdictions, where the courts have recognised such a right, court challenges of the right frequently arise.<sup>727</sup>
- 16.36 Another possible benefit of a statutory right of decision is that it would enable third parties, such as the coroner or a funeral director, to release the body to the person who they know has a defined legal right to it. It might give them some useful assurance if the parties are in dispute.<sup>728</sup>
- 16.37 It would be possible to design a new statutory framework based around the recognition of a statutory right of decision as to burial. That could be built into the Burial and Cremation Act or its replacement statute.
- 16.38 Examples of overseas jurisdictions that include a rights-based framework in their burial legislation include British Columbia, Saskatchewan, Alberta and a number of United States jurisdictions.<sup>729</sup> The Queensland Law Reform Commission also recommended in 2011 that the Cremations Act 2003 (Qld) be expanded to include a rights-based framework for burial decisions and be renamed the “Burials and Cremations Act 2003 (Qld)”.<sup>730</sup>
- 16.39 If a new rights-based framework were to be adopted in New Zealand, a large number of consequential policy decisions would be required. Some of these could be adopted, or adapted, from existing common law,<sup>731</sup> but given this is a first-principles review of the law we think there should also be fresh scrutiny of these matters.
- 16.40 In the following section we give an introductory overview of the range of matters that would need to be considered, chief among which is the question of who would be entitled to exercise the right and in what circumstances. Many of these matters, and additional ones, have been explored or covered in more depth in other jurisdictions, particularly by the Queensland Law Reform Commission in its 2011 report, *A Review of the Law in Relation to the Final Disposal of a Dead Body*. We make references to those jurisdictions in our discussion.

## QUESTIONS FOR THE DESIGN OF A RIGHTS-BASED FRAMEWORK

- 16.41 In this section we give an overview of the following questions which would be raised in the design of a new rights-based framework:
- Who is entitled to exercise the right?
  - What is the scope of the right?

725 This is the current position in relation to the executor rule: see ch 14 at [14.5].

726 Kimberley E Naguit “Letting the Dead Bury the Dead: Missouri’s Right of Sepulcher Addresses the Modern Decedent’s Wishes” (2010) 75 Missouri Law Review 248 at 269, as cited in Conway “Burial Instructions and the Governance of Death” (2012) 12(1) OUCJLJ 59 at 79.

727 Lynden Griggs and Ken Mackie “Burial Rights: The Contemporary Australian Position” (2000) 7 JLM 404 at 408–409.

728 See ch 15 at [15.12].

729 See the Cremation, Interment and Funeral Services Act SBC 2004 c 35; Funeral and Cremation Services Act RRS 1999 c F-23.3; General Regulation to Funeral Services Act 1998; Minn Stat.

730 Queensland Law Reform Commission *A Review of the Law in Relation to the Final Disposal of a Dead Body* (QLRC R69, 2011).

731 For instance, the Supreme Court has made suggestions as to the extent of a decision-maker’s duty of consultation: *Takamore v Clarke* (SC), above n 716, at [156].

- What are the duties of the rights-holder?

16.42 One aspect we think should form part of any new rights-based framework is the ability for the exercise of the right to be reviewed by the court upon application by an interested third party.<sup>732</sup> That is the case overseas<sup>733</sup> and it would also align with the position adopted by the Supreme Court in *Takamore v Clarke*.

### Who is entitled to exercise the right?

- 16.43 One of the most complex matters is likely to be determining who is entitled to exercise the right and how that person or persons are identified.
- 16.44 There are a range of different models for design. One option would be to treat family collectively as having the right to carry out disposal unless the individual had expressed a different wish in advance. In that case, the family would be legally bound to follow that decision. Alternatively, family might be treated as having the final right of decision, even above the wishes of the deceased, but required to take the wishes of the deceased into account when exercising that decision.
- 16.45 Another alternative would be to identify a single family member thought to have the best right to exercise the decision. That person could either be required to carry out the wishes of the deceased, or they could be required to take the deceased's wishes into account (but not necessarily to treat them as determinative) when exercising the right of decision.
- 16.46 The difficulty is that settling on a model requires balancing the wishes of the deceased, which may or may not have been expressed, against the many and varied needs of survivors (and also having regard to public and community interests).
- 16.47 It may help in this balancing process to consider different ways of thinking about the roles of the survivors and of the deceased in the burial decision.

### Conceptualising the role of family in burial decisions

- 16.48 Broadly, there may be two ways of thinking about the role of surviving family in burial decisions. The first is to take a ranking approach to the relationships of individual survivors with the deceased, while the second is to approach the family/whānau as a collective whole.
- 16.49 Conway and Stannard note that literature on the role of family in death and bereavement is a growing field. They refer to Peskin's ranking approach which suggests that the relationships the deceased had in life, such as relationships with family and friends, can be "ranked" according to closeness of the deceased.<sup>734</sup> Using that theory it might be argued that the role of family, in burial decisions, should be conceptualised as forming a hierarchy of individuals based on proximity of relationship to the deceased (whether their actual relationship or their blood relationship)<sup>735</sup> and that it should therefore be possible to single out a person who was most highly ranked and should qualify to exercise the right to decide. Such an approach is also likely to satisfy legal

732 See ch 17.

733 See Cremation, Interment and Funeral Services Act SBC 2004 c 35; The Funeral and Cremation Services Act RRS 1999 c F-23.3; General Regulation to Funeral Services Act 1998 (Alberta).

734 Conway and Stannard, above n 702, at 867.

735 See generally Frances H Foster "Individualized Justice in Disputes over Dead Bodies" (2008) 61 Vand L Rev 1351.

values like certainty and administrative efficiency. According to some commentators and courts it is desirable because it is more likely to lead to “timely disposal”.<sup>736</sup>

- 16.50 However, ranking relationships in statute may be seen as incongruent with changing and increasingly diverse family structures and not giving full account to cultural and social understandings of family as a collective group, in which no particular relationship is necessarily treated as ranking above others in the post-death period. Other objections to the ranking approach include that it is artificial to rank the deceased’s relationships in such a way, particularly if it is based on a pre-defined legal hierarchy based on blood relationship with the deceased.<sup>737</sup>
- 16.51 Cultural matters feed into this discussion. Identifying an individual family member as having a right of decision might appeal to a cultural perspective in which burial decisions are usually made in a timely manner and in which the spouse or close partner of the deceased – that person who spent most time with the deceased in life, or their heirs – is seen as the natural decision-maker. Recognising a right of decision as vesting in family or a collective group might be more acceptable to cultural traditions that value collective decision-making and the interest of the deceased’s family or cultural group in burial decisions.
- 16.52 If the ranking approach seems a reasonable way of thinking about the role of family in burial matters, a statutory hierarchy is a possible model to identify or select an individual decision-maker. Such hierarchies are used for this purpose in several Canadian provinces.<sup>738</sup> Several design questions would arise with respect to a statutory hierarchy, including:
- the order of family members on the hierarchy;
  - the circumstances in which the right passes on to the next named family member in the hierarchy, if the person who otherwise has the priority right is prevented from exercising it; and
  - distinguishing between the rights of equally ranked family members on the hierarchy, such as siblings or parents of a deceased.
- 16.53 In New Zealand, a possible hierarchical order is the legislative order of priority for the right to apply for letters of administration contained in the High Court Rules.<sup>739</sup> First-named in the list is the spouse or partner, then parents, children, and so on. Another possible hierarchical order, which could apply where appropriate, is the order used in the Māori Land Court for testate and intestate succession under Te Ture Whenua Maori Act 1993. Under this hierarchy the right would devolve first to children (instead of to a spouse or partner); then to brothers and sisters; then to those who are related by blood to the deceased and are members of the hapū associated with the land with which the deceased had connections.<sup>740</sup>
- 16.54 The most obvious scenario in which the right would devolve down the hierarchy is where the highest-ranked family member is unavailable or unwilling to exercise it. There could also be a minimum age requirement. More complex questions in this realm are whether the right should

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736 See the comments of Kimberley E Naguit as cited in Conway “Burial Instructions and the Governance of Death”, above n 708, at 79 and *Takamore v Clark*, above n 716, at [153]. See for example judicial statements in the US case *Burnett v Surratt* 67 SW 2d 1041 (Tex Civ App, 1934) at 1041; in Australia in *Calma v Sesar* (1992) 106 FLR 446 at 452 and in England in *Buchanan v Milton* [1999] 2 FLR 844 at 854. See also *Warner v Levitt* (1994) 7 BPR 15,110 and *Privet v Vovk* [2003] NSWSC 1038 (7 November 2003) at [6].

737 Foster, above n 735.

738 Alberta Regulation 226/98, r 36(2); Funeral and Cremation Services Act SS 1999 c F-23.2, s 31(1); and Cremation, Internment and Funeral Services Act SBS 2004 ch 35, s 5.

739 High Court Rules, r 27.35. This was the approach of the Queensland Law Reform Commission, which took the relevant statutory order used in Queensland as the starting point for a recommended statutory hierarchy of those entitled to control disposal: see above n 730, at [6.97].

740 Te Ture Whenua Maori Act 1993, s 109.

pass on to a person who is, or may be, criminally responsible for the death of the deceased.<sup>741</sup> Another question, discussed by the Queensland Law Reform Commission, is whether there should be a requirement as to “cultural appropriateness” of the decision-maker.<sup>742</sup>

- 16.55 The method of distinguishing between equally-ranked persons on the hierarchy could be specified in statute,<sup>743</sup> or it might also be possible to leave that to be decided by the court as and when necessary.
- 16.56 An alternative way of conceptualising the role of family in burial decisions is as a collective body, exercising its rights in the manner that suits. That may include exercising deference to a person perceived as having authority; entering into discussion; making compromise; acquiescing to decisions; and/or attempting to reach consensus. Another possible model, therefore, is simply to vest a right of decision in family as a collective whole. A broad definition of family such as that used in the Coroners Act could be used, to ensure that everyone with an interest could be involved in the decision.
- 16.57 Objections to this approach may be that it is more unusual for rights to be exercised collectively and for some this also raises concerns of delay or inefficiency, because there has to be some kind of consultation and discussion between the various people who are entitled to exercise the right, especially if they are required to reach consensus.

#### *Conceptualising the role of the deceased*

- 16.58 Alongside the role of family, it is increasingly being recognised that the deceased also has an obvious interest in burial matters. The proper role for the deceased’s wishes in these matters has been much debated and centres primarily on one’s view of the extent of the deceased’s individual autonomy.<sup>744</sup> Broadly, it might be said there are two possible ways of thinking about the wishes of the deceased: first, that the deceased’s wishes are influential but should not be treated as legally enforceable or determinative in a dispute; or second, that the deceased’s wishes should have binding legal status.
- 16.59 Under the first approach the deceased’s autonomy is recognised in surrogate form; that is, they are entitled to choose someone, before they die, to make burial decisions on their behalf. They cannot bind that person to any particular decision, although the surrogate might be legally required to take the deceased’s wishes into account. We note that this is the model currently seen in New Zealand common law, with the executor acting as the deceased’s agent or surrogate.
- 16.60 The surrogate approach gives the decision-maker discretion to determine what is most appropriate based on the applicable circumstances at the time of disposal. The decision-maker might consider the funds available to carry out disposal; any expressions or wishes that the deceased made before their death; and any wishes of relatives or friends. It might be favoured for that reason, as opposed to a binding directions approach.
- 16.61 It has been argued that this approach takes less account of the individual autonomy of the deceased, as compared to treating the deceased’s wishes as legally binding in and of

741 See the discussion in Queensland Law Reform Commission, above n 730, beginning at [6.131]. See generally the discussion in ch 6 of that Report.

742 Queensland Law Reform Commission, above n 730, at [6.106]–[6.108].

743 The Canadian hierarchies provide that if two people with an equal claim contest the right, the eldest is entitled to decide. This is a certain and simple method of prioritising the rights in question, but is also arbitrary. Some American hierarchies authorise a majority of the disputing parties to control disposal; but this provides no answer when there are only two people in the category in question or when disagreement is split evenly within a group. See the discussion in Queensland Law Reform Commission, above n 730, at [6.39]–[6.41].

744 See above at paras [16.10]–[16.16].

themselves.<sup>745</sup> On the other hand, it might be said that this approach better balances the needs and interests of both the living and deceased:<sup>746</sup>

One has to consider respect for the wishes of the deceased and the needs of the living. It is often impossible to say whether the deceased foresaw every possible circumstance and the implications they might have upon his or her family.

- 16.62 Because the deceased can choose this person before their death, it allows them to express their individual autonomy, but within more constrained parameters. They might be expected to choose someone who they believe will carry out their wishes, if that is very important to them.
- 16.63 If this is the desired approach for a new rights-based statutory framework, the Burial and Cremation Act or its replacement could state that a person is entitled to appoint an agent or custodian to make burial decisions on their behalf after they die. That person would be under legal duties and obligations, including to take the deceased's wishes into account. This role would be fulfilled separately from the role of the executor, whose rights and duties would then be limited to the legal estate, not the body (although the same person could be chosen for both roles). The person chosen to make the burial decision in the event of a dispute would have been specifically chosen by the deceased for that purpose, rather than exercising that role through the proxy of being the person who administers the estate.
- 16.64 This is the approach taken in the state of New York and in some other United States jurisdictions.<sup>747</sup>
- 16.65 Under the second conception of the deceased's role, the deceased's wishes, in and of themselves, are treated as binding burial directions. Some say this approach is required in order to give full account to the deceased's individual autonomy.<sup>748</sup> There is a possible conceptual difficulty with allowing people to express binding disposal directions, since they would not be enforceable in a strict legal sense. If all of the family agrees not to follow them, the deceased has no legal recourse. That aside, it might nonetheless be desirable to treat the deceased's wishes as binding burial directions, as a symbolic expression of the extent of the deceased's individual autonomy.
- 16.66 Existing statutory precedent for this arguably already exists in New Zealand, in the form of the Human Tissue Act 2008. Since 2008 that Act has allowed people to consent to the use of their body after death for educational or therapeutic purposes in a form which is legally binding on their survivors.<sup>749</sup> The deceased's informed consent (or objection) is treated as determinative, even if the wishes of family members conflict.<sup>750</sup> We note, however, that the Human Tissue Act regime has different policy drivers behind it (including the public interest in increasing New Zealand's rates of organ donation).
- 16.67 Some statutory regimes overseas treat the deceased's wishes as legally binding on survivors so long as the form and content of the wishes meet certain minimum conditions. Section 6 of the Cremation, Interment and Funeral Services Act (BC) provides:

A written preference by a deceased person respecting the disposition of his or her human remains or cremated remains is binding on the person who under section 5, has the right to control disposition of those remains [...]

745 See for example Eli Byron Stuart Ball "Property and the human body: A proposal for posthumous conception" (2008) 15 JLM 556 at 557–559.

746 Queensland Law Reform Commission, above n 730, at [5.52].

747 NY PBH Law § 4201. See also Minn Stat 2012 § 149A.80.

748 See above at [16.11]-[16.13].

749 Under the previous 1964 Act, family members effectively had a statutory right of veto where they did not want donation to proceed.

750 Although in practice, the medical community may not carry out donations if the family are opposed: see Nicola Peart "Immediately Post-Death: The Body, Body Parts and Stored Human Tissue" (paper presented to the NZLS CLE Intensive, 2012) at 133 and n 225.

- 16.68 Section 5 sets out a list of persons who are entitled to control disposition, and who would therefore be required to carry out the deceased's written preference.
- 16.69 A similar approach has also been taken by several American states<sup>751</sup> and was also one of many recommendations made by the Queensland Law Reform Commission in 2011.<sup>752</sup> The Commission recommended that their statute include a provision stating that if a person is arranging for the disposal of the remains or ashes of a deceased person and knows that the deceased has left "funerary instructions", that person must take reasonable steps to carry out those instructions.<sup>753</sup> The Ontario Law Reform Commission and the Law Reform Commission of Western Australia also recommended a similar approach be taken in their jurisdictions.<sup>754</sup> So far none of these recommendations have been enacted into law.
- 16.70 The examples from those jurisdictions just listed provide a possible model for a legal mechanism so an individual can give binding burial directions that would take priority in the event of a burial dispute.<sup>755</sup> The directions could be made binding on an individual survivor or on a more broadly defined family group, if that was considered better suited to New Zealand circumstances.
- 16.71 Adopting such a model would require additional policy decisions, such as:
- How to achieve clarity and certainty around the deceased's wishes. Do they need to be written and signed? Should there be a national register for recording disposal instructions?<sup>756</sup>
  - Policy limits around what constitutes enforceable disposal instructions. Instructions that do not comply with the law would necessarily be unenforceable. What if the deceased's instructions were impossible, too difficult to carry out, or would exhaust the financial estate?<sup>757</sup>
- 16.72 If the deceased is Māori, a binding burial directions approach might negatively affect the cultural rights of the deceased's whānau, hapū or iwi. The Māori world view places high importance on the genealogical, spiritual and physical links between the deceased, their ancestors and their living family members. The potential effect on those linkages of treating the deceased's wishes as binding must be taken into account when considering whether a regime like this should be implemented.<sup>758</sup>
- 16.73 In all instances, under this model, a family member or survivor who strongly objected to the deceased's burial directions would be able to apply for an order from the court to prevent them from being carried out. It would perhaps be necessary to include in the statute a requirement that the court, in reviewing any such wishes, consider whether carrying those out would have a detrimental effect on tikanga Māori.

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751 Minn Stat 2012 § 149A.80; Pa Stat Ann, title 20 § 305; DC Code § 3-412 and 3-413; and NM Stat § 24-12A-2.

752 Queensland Law Reform Commission, above n 730.

753 At [5.105] and R[5.1].

754 Ontario Law Reform Commission *Administration of Estates of Deceased Persons* (R39, 1991) at 39–40 and Law Reform Commission of Western Australia *Aboriginal Customary Laws: The Interaction of Western Australian law with Aboriginal Law and Culture* (Final Report, Project 94, 2006) at 260–262.

755 Conway, above n 708, at 72.

756 At 86. As to formalities see the discussion in Queensland Law Reform Commission, above n 730, at [5.111] –[5.132].

757 See discussion in Queensland Law Reform Commission, above n 730, at [5.91].

758 See for example opposition by the Māori Party to the Human Tissue Bill which introduced the ability for individuals to make a binding consent to re-use of their body or body parts under the Human Tissue Act 2008. It was claimed the effect of the Bill would be that the "wishes of the individual will prevail at all times and at all costs. And the cost is quite simply another piece of legislation that marginalises, ignores, and rides over the cultural imperatives provided by tikanga Maori": (23 October 2007) 643 NZPD 12607.

16.74 An additional possibility is to impose a statutory duty on the person leaving their wishes to take into account the needs and values of their family. Such a requirement is imposed under section 42 of the Human Tissue Act 2008 on those deciding whether to donate their body or body parts:

**42 Duty to take into account immediate family's cultural and spiritual needs, values, and beliefs**

A person giving informed consent or raising an informed objection or overriding objection must take into account, so far as they are known to the person based on information available to the person in the circumstances, and decide what weight the person wishes to give to, the cultural and spiritual needs, values, and beliefs of the immediate family of the individual whose tissue is, or is not, to be collected.

16.75 We wonder whether including a provision like this in a binding directions framework would be sufficient to mediate some of the concerns such a framework might raise.

### What is the scope of the right?

16.76 The final two matters we briefly raise about a possible new rights-based framework are (1) the scope of the right; and (2) the duties of the rights-holder.

16.77 Questions about the scope of the right include, for example, whether it extends to deciding the funeral ceremony and performance of any funeral rites, or whether it should be limited to determining the location and manner of burial of the body.

16.78 Under existing common law the executor's rights in this regard are unclear. It might be possible to leave the application and interpretation of the scope of the right to the court to determine on a case-by-case basis, but it seems to us that would undercut the argument for certainty and clarity that is a large part of the rationale for enacting a statutory right to control disposal. The approach in overseas jurisdictions may provide a steer for the possible scope of a new statutory right of decision.<sup>759</sup>

16.79 We also note that a rights-based statutory framework may also need to consider the point at which the right becomes operative. It could begin to operate at the point at which there was dispute or disagreement.<sup>760</sup> If there were no disagreement, the right would not be exercisable. It may be useful for burial legislation to include explicit guidance as to when the right becomes exercisable.

### What are the duties of the rights-holder?

16.80 Once the decision-maker has been identified, additional matters to consider may include:<sup>761</sup>

- how much the decision-maker must consult and with whom; and
- what factors the decision-maker must take into account when making their decision.

16.81 It may be desirable for the decision-maker to be under a statutory duty to consult widely and to facilitate discussions between family members before they make their decision. That is also likely to take time. At present the executor is obliged to take into account views that are conveyed to him or her, but is not under a duty to go and seek out those views.<sup>762</sup>

<sup>759</sup> See, for example, the way the right has been formulated in the legislation of Alberta, Canada (Alberta Regulation 226/98, r 36(2)), versus the District of Columbia, United States (DC Code § 3-412 and 3-413). See also Queensland Law Reform Commission, above n 730, at [R6-3].

<sup>760</sup> See the judgment delivered by McGrath J in *Takamore v Clarke* (SC), above n 716, at [154], discussing the point at which the executor rule becomes operative.

<sup>761</sup> Note that this may depend on the final form of the statutory regime.

<sup>762</sup> *Takamore v Clarke* (SC), above n 716, at [156].

16.82 The statute could include a list of matters that the decision-maker must take into account, such as the wishes of the deceased and any values forming part of the “deceased’s heritage”.<sup>763</sup>

## CONCLUSION AND QUESTIONS

16.83 Throughout this chapter we have set out a range of considerations, questions and examples of models to inform the possible design of a new statutory framework for burial disputes to replace the executor rule. We have emphasised the need for flexibility in the final form of any statutory regime. It may be that our final recommendations for statutory reform integrate aspects of a number of different approaches, or even that the best design of a new system is one that allows people to “opt in” or “opt out” of different approaches.

16.84 We note in our summary that the New Zealand legal system has a strong history of formulating innovative approaches to socio-legal problems. A similarly innovative approach might be possible here.

## CONSULTATION QUESTIONS

Q16 Do you think the process for resolving a serious burial dispute should be clarified in legislation? Please give reasons.

Q17 Any new statutory regime would need to reflect the values New Zealanders think should underpin the law in this area. For example, the wishes of the deceased have great moral force, but should they be legally binding? Or are the needs of the bereaved more or equally important? We are interested in the weight New Zealanders think should be given to the different values and interests involved in these decisions. Please order the following values 1–7, with 1 being the most important value and 7 the least. If you think several factors should be given the same weight, give them the same ranking:

- meeting the needs of any surviving partner to mourn and commemorate the deceased in a way they consider most appropriate;
- meeting the needs of close relatives to mourn and commemorate the deceased in a way they consider most appropriate;
- ensuring the wishes of the deceased, if they have been clearly expressed, are carried out;
- ensuring that cultural needs, such as reconnecting the deceased with a significant place and with their family lineage, are met;
- ensuring that the family’s religious requirements in relation to mourning and burial are met;
- ensuring that all those with a strong interest in the decision, such as the deceased’s extended family/whānau, are given an opportunity to be consulted and express their views;
- ensuring there is clear and certain legal responsibility for making burial and cremation decisions and clear guidance for decision makers; and
- are there any other factors or values you think should be taken into account?

<sup>763</sup> At [164].

### *Additional questions*

- 16.85 In addition to the high-level questions posed above, we also raise the following more detailed questions for consideration by those who have a view:
- (a) If a rights-based regime were enacted, should it seek to vest the right of decision in an individual family member? Or should it vest the right of decision in the family of the deceased as a whole?
  - (b) If the right is able to be vested in an individual family member:
    - How should that person be identified?
    - Should they have the right to determine funeral rites and ceremonies as well as the location and method of disposal of the deceased?
    - Should there be a duty to actively consult with interested friends and family before reaching a decision, or should the decision-maker only be required to take into account those views conveyed to him or her?
  - (c) If an individual has the right to express their wishes in advance, should that be limited to stating the person who has the right of decision, with a requirement that the decision-maker take the deceased's wishes into account?
  - (d) Alternatively, should the deceased be able to leave binding burial directions which control the substantive form of burial, subject to court orders? If so what other mechanisms, if any, should be included in the statutory regime to balance the rights of the individual deceased against the interests of their family, community, and the public?
  - (e) Do you have any views or concerns about whether allowing the deceased to leave binding burial directions might have negative implications for tikanga Māori or other cultural or religious beliefs? Would inclusion of a provision like s 42 of the Human Tissue Act help address those concerns?

# Chapter 17

## Court jurisdiction, procedure, and remedies

- 17.1 The Supreme Court in *Takamore v Clarke* treated the courts as the appropriate final arbiter of burial disputes. The majority held that the common law had “reached the position where a person who is aggrieved with the decision of the personal representative may challenge it in the High Court”<sup>764</sup> and also made suggestions for how the High Court might deal with applications to control burial in cases of intestacy.<sup>765</sup>
- 17.2 Elias CJ was also supportive of jurisdiction lying with the courts:<sup>766</sup>
- The responsibility to decide as to the disposal of the body where there is dispute is inescapably that of the Court on application made to it.
- ...
- Although the position of a court asked to resolve such differences is not a comfortable one, there is nothing particularly unusual in that. Courts not infrequently have to decide between positions that are not readily comparable.
- 17.3 As noted by Griggs and Mackie, these proceedings will not be “ordinary litigation.”<sup>767</sup> Burial dispute cases arise in circumstances of high emotional tension. The High Court might have to hear evidence about the relationships between the parties and the conduct and statements of the deceased that can be difficult to verify. A quick decision might also be required if the Court has been asked to make urgent interim orders to prevent a burial going ahead until the substantive dispute can be resolved, as was the case in the dispute over the body of James Takamore.<sup>768</sup>
- 17.4 It will probably be unusual for most disputes to reach this stage. We expect that most disputing survivors are likely to want to resolve the dispute between themselves, “in the shadow of the law”, and in a way that suits their family circumstances. Nonetheless, on the occasions that disputes do reach the courts, the courts should be able to resolve them appropriately.
- 17.5 The question we explore in this chapter is whether the High Court is accessible for parties who need it and whether it is well-placed, under the current common law framework, to decide burial disputes. We set out options for reform that might make the court system more accessible and effective for parties in dispute, including in disputes involving tikanga Māori. We also discuss potential remedies at the end of this chapter.

764 *Takamore v Clarke* [2012] NZSC 113, [2013] 2 NZLR 733 at [160].

765 At [143]–[148].

766 At [10]–[11].

767 Lynden Griggs and Ken Mackie “Burial Rights: The Contemporary Australian Position” (2000) 7 JLM 404 at 404.

768 *Clarke v Takamore* [2010] 2 NZLR 525 (HC).

## STATUTORY GUIDANCE

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- 17.6 The jurisdiction of the High Court now extends to assessing the substance of a burial decision for its appropriateness. It has been said that the review process should be a “straightforward one that is capable of providing a prompt decision.”<sup>769</sup> The Court should address the relevant viewpoints and circumstances and make its own assessment, and exercise its own judgment, as to the appropriateness of that decision.
- 17.7 Overseas, courts that have statutory responsibility for reviewing burial decisions in this manner usually have recourse to statutory guidance, in the form of a list of factors they must take into account.<sup>770</sup> This list guides the exercise of the courts’ discretion and can help increase the certainty and transparency of judicial decision-making. At the same time the courts are able to apply their discretion to determine what weight to give to relevant competing considerations.<sup>771</sup>
- 17.8 No such factors are contained in the Burial and Cremation Act 1964 (the Act), as it is not the source of the High Court’s jurisdiction in these matters.<sup>772</sup> Guidance in existing New Zealand case law is also limited. If the Court is asked to decide between two proposed burial sites, it might assess the nature and closeness of the relationship of the deceased with each location at the time of death.<sup>773</sup> Beyond that, however, it is unclear what, of a possibly wide range of matters, the Court could or should take into account, and what weight should be placed on them, in any future burial proceedings.
- 17.9 One option is to include in the Act, or its replacement statute, a list of matters the Court should take into account in a burial dispute. This could be included regardless of the final form of any statutory regime, although the list of factors included and the weight to be given to them will depend on the form of the statutory regime, as discussed in chapter 16. In British Columbia, where the deceased is entitled to leave binding burial directions, the Supreme Court may make an order upon the application by a person claiming “the right to control disposition”.<sup>774</sup> In those proceedings the Court is required to have regard to “the rights of all persons having an interest” and, without limitation, to give consideration to:<sup>775</sup>
- the feelings of family and those associated with the deceased;
  - the deceased’s religious faith and the rules, practice and beliefs respecting burial held by people of that faith; and
  - any “reasonable directions” of the deceased respecting the burial of their remains.
- 17.10 In these proceedings the Supreme Court is also directed to consider “whether the dispute that is the subject of the application involves family hostility or a capricious change of mind”.<sup>776</sup>
- 17.11 In its review of Queensland burial legislation, the Queensland Law Reform Commission recommended that the Queensland Supreme Court should be able to, upon application, make an order in relation to the exercise of “the right to control the disposal of the human remains of a

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769 *Takamore v Clarke* (SC), above n 764, at [162].

770 An exception is Alberta, which provides that the right is exercised subject to a Court order but is otherwise silent as to the factors the Court must take into account: General Regulation to Funeral Services Act Alberta Regulation 226/98, reg 36(2).

771 *Kartsonas v Stamoulos* 2010 BCCA 336.

772 See ch 14 at [14.79].

773 *Takamore v Clarke* (SC), above n 764, at [167].

774 Cremation, Interment and Funeral Services Act SBC 2004 ch35 s 5(4).

775 Section 5(5).

776 Section 5(5)(d).

deceased person”.<sup>777</sup> In those proceedings it suggested that the Court should be required to have regard to:<sup>778</sup>

- the importance of disposing of remains in a dignified, respectful and timely way;
- the funerary instructions or wishes of the deceased;
- the cultural and spiritual beliefs held, or the cultural and spiritual beliefs practised, by the deceased in relation to the disposal of remains; and
- the interests of family members.

17.12 The Minnesota statute provides that, where a dispute concerns many people with a right to decide who cannot make a decision by majority vote, the Court should consider:<sup>779</sup>

- the reasonableness, practicality, and resources available for payment of the proposed arrangements and final disposition;
- the degree of the personal relationship between the deceased and each of the persons in the same degree of relationship to the deceased;
- the wishes of the deceased and the extent to which they have provided resources for those wishes to be carried out; and
- the degree to which the arrangements and final disposition will allow for participation by all who wish to pay respect to the decedent.

17.13 In the New Zealand context, one relevant factor would be the impact on tikanga Māori.

## JURISDICTION

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17.14 In *Takamore v Clarke* the Supreme Court proceeded on the basis that burial disputes would be heard by the High Court, most likely within its inherent jurisdiction. However, it is questionable whether the High Court is the court best suited to that task. In this section we consider whether it would be preferable to confer statutory jurisdiction on one or more different courts in the New Zealand court system.

### The High Court

#### *Traditional jurisdiction*

17.15 It might be argued that burial disputes do not fall within the traditional sphere of expertise of the High Court. The High Court is generally unaccustomed to making decisions on behalf of people, but usually reviews decisions already made. That is why judges in courts of general jurisdiction, whether in New Zealand or overseas, tend to defer to the decision of an executor. As long as the decision is not manifestly unreasonable and the executor has considered the views of others, the courts have been reluctant to displace it.<sup>780</sup> This approach is consistent with exercising a kind of judicial review function towards the executor’s decision, with a high threshold for interference.

17.16 In New Zealand, the Supreme Court’s clarification of the basis on which the High Court can intervene under New Zealand common law (that it is entitled to review the substance of the

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<sup>777</sup> Queensland Law Reform Commission *A Review of the Law in Relation to the Final Disposal of a Dead Body* (QLRC R69, 2011) at [6.113].

<sup>778</sup> At [R6-11] and from [6.114].

<sup>779</sup> Minn Stat 2012 § 149A.80, subd 5.

<sup>780</sup> Heather Conway and John Stannard “The Honours of Hades: Death, Emotion and the Law of Burial Disputes” (2011) 34UNSWLJ 860 at 882 and generally at 881–891.

decision, not just the manner in which it was made) gives the High Court greater leeway in future disputes to make the decision on behalf of the executor, rather than limiting itself to reviewing the decision already made.<sup>781</sup> Although common law jurisprudence on this will develop progressively, it cannot be expected to build up quickly over time, since burial dispute cases are relatively rare in New Zealand.

- 17.17 This raises the question of whether it is desirable to leave these matters within the inherent jurisdiction of the High Court, or whether they would be better dealt with in a court that is used to encouraging the parties to reach decisions on difficult matters and, where necessary, where the court is able to make a decision itself.
- 17.18 Linked to this are the processes and procedures the High Court has at its disposal to help the parties make a decision. As a traditional litigation forum, the High Court is not designed to deliver mediated, consensus-based outcomes or to encourage the parties to reach the decision that suits them best. Josias has argued convincingly in favour of greater use of mediation in burial disputes.<sup>782</sup> However, the High Court has limited statutory ability to refer parties to mediation.<sup>783</sup> Nor do parties to a burial dispute have optional recourse to state-funded mediation services as an alternative or precursor to High Court proceedings.<sup>784</sup>

### Accessibility

- 17.19 Filing High Court proceedings is a relatively complex and lengthy process. It is also expensive, with filing fees of \$1,350 for initiating an application.<sup>785</sup> The total cost of bringing proceedings is likely to be much higher, factoring in the cost of amendments, hearing fees and any interlocutory applications. On top of court costs, there are also lawyers' fees and other potentially unforeseen costs, such as the cost of storing the body while the case is heard.

### The Family Court

- 17.20 One option is to confer explicit statutory jurisdiction on the Family Court to hear these disputes. The Family Court has several advantages in this regard.<sup>786</sup> Family Court registries are spread widely throughout the country.<sup>787</sup> The cost of commencing proceedings in the Family or District Courts is closer to \$200.<sup>788</sup> The Family Court integrates mediation into its resolution processes.<sup>789</sup> Another advantage is that the Family Court can process applications speedily, which will sometimes be required in burial disputes.
- 17.21 The Family Court has jurisdiction to make orders related to a range of family matters. A similar jurisdiction could be conferred to make "burial orders". This proposal would bring

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781 *Takamore v Clarke* (SC), above n 764, at [162].

782 Brian L Josias "Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies" (2004) 79 *Notre Dame L Rev* 1141. See also Theresa E Ellis "Loved and Lost: Breathing Life into the Rights of Noncustodial Parents" (2005) 40 *Val U L Rev* 267.

783 High Court Rules, r 7.79. The High Court does have inherent jurisdiction to order the parties to proceedings to attempt mediation of their dispute: *Maddaver v Umawera School Board of Trustees* [1993] 2 NZLR 478 (HC).

784 Unlike in Queensland: see Queensland Law Reform Commission, above n 777, at [6.216].

785 High Court Fees Regulations 2013, Schedule.

786 The Law Commission recently reviewed the operation of the courts under the Judicature Act 1908 but made no specific recommendations for the Family Court that would affect the proposals put forth in this Issues Paper: Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012).

787 Family Court judges sit in 58 Courts throughout the country.

788 The fee for filing an initial document in the District Courts is \$200: District Courts Fees Regulations 2009, sch 1. Filing an application under the Family Proceedings Act 1980 is \$211.50 (Family Courts Fees Regulations 2009, sch 1). Filing an application under the Care of Children Act 2004 is \$220 (Family Courts Fees Regulations 2009, sch 2). The Family Court Proceedings Reform Bill (90-2) does not state that any changes are to be made to the fees in the Family Courts Fees Regulations 2009.

789 The Family Court Proceedings Reform Bill (90-2) puts an even greater emphasis on parties using mediation to resolve their disputes outside of court.

greater certainty than leaving the position as it is, where the High Court has a largely untested substantive review power. If the Family Court is empowered to make orders, families who are in a dispute would know that an accessible court is available to assist, if required.

- 17.22 If one or more parties approach the Family Court, it could make an interim order that the body be placed under the care of one of the parties (perhaps a person who has a recognised statutory right of decision<sup>790</sup> or a nominated funeral director) or that it not be moved from its current location until the dispute has been resolved, including any mediation processes completed. The interim order could be made without notice in the first instance, if need be. An analogy might be drawn with the Family Court's existing jurisdiction to make orders to prevent a risk of child abduction, which often must be made urgently to address a significant risk.

### *Mediation*

- 17.23 Under this option, mediation could be compulsory if required by the Family Court Judge. The government body known as Dispute Resolution Services Limited could be ideally placed to conduct mediation in the first instance. The time for mediation should be limited – required to be completed within 14 days. If no agreement is reached after mediation, the matter would return to the Family Court to determine whether the matter needs to be decided with a court order. Orders could be made in accordance with guiding statutory factors (discussed in the previous section).

### *Appeal*

- 17.24 Another question is whether, under this option, an order made in the Family Court should be open to appeal in the High Court. Appeal rights serve an important purpose in our justice system but introducing a right of appeal here could further delay disposal.<sup>791</sup> The expert, specialist function of the Family Court may weigh against including a right of appeal,<sup>792</sup> although we note that other decisions of the Family Court are open to appeal to the High Court.<sup>793</sup> The significance of the disposal decision and its finality favour including a right of appeal: Josias notes that decisions about burial are difficult to undo and that “[p]ublic policy and human nature frowns on disturbing the remains of the deceased”.<sup>794</sup> The decision to cremate is physically impossible to reverse.
- 17.25 Whether or not there should be a right of appeal may depend on what the grounds of appeal are. It might not be desirable under this option to allow parties to relitigate the whole matter. However, a carefully-framed right of appeal to the High Court that is limited to matters of law might be appropriate.

## **Māori customary law**

### *Options involving the Māori Land Court*

- 17.26 There is an option to confer jurisdiction for hearing burial disputes involving the application of Māori customary law on the Māori Land Court. This could be done by way of an extension to the existing jurisdiction of the Māori Land Court as contained in Te Ture Whenua Maori Act 1993. The Māori Land Court would then have concurrent jurisdiction to hear certain claims and to make an order either stating who has the right to control disposal or perhaps giving specific burial directions.

790 See ch 16.

791 See Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001, last updated 2012) at 276–278.

792 At 276.

793 See District Courts Act 1947, s 72.

794 Josias, above n 782, at 1145.

- 17.27 If this were the case, we suggest that the Family Court could still be the first port of call for all applications for burial direction orders made under urgency. The Family Court has duty judges available to deal with those matters as required, whereas the Māori Land Court may be less well-placed to do so. Once the position has been secured, the parties could request, or the Family Court Judge could direct (with agreement from the parties), that the matter then be transferred to the Māori Land Court if it raises matters of tikanga.
- 17.28 Our preliminary view is that only when both parties agree should proceedings be transferred in this manner. It would be necessary for all who come before the Māori Land Court to be comfortable with potentially lengthier timelines and processes, and with the fact that the dispute would be decided according to rules and principles derived from tikanga. It is likely to be impracticable for a Family Court Judge and Māori Land Court Judge to decide the case together as that would raise difficult jurisdictional questions.
- 17.29 We note that at the time of writing the Te Ture Whenua Maori Act 1993 is under review.<sup>795</sup> We also note that the Māori Land Court does not deal with all disputes involving tikanga and that some may take the view that courts of general jurisdiction, which have an established body of law around recognition of tikanga, are the more appropriate forums for those disputes. Nonetheless the advantage of this option is the valuable repository of knowledge of tikanga in the Māori Land Court that would be available to the parties.

#### *Options involving the Family Court*

- 17.30 We note that the Family Court currently deals with proceedings involving matters of tikanga Māori. If orders are requested that involve transferring guardianship of a child between different whānau, hapū or iwi, the Family Court is likely to consider the cultural implications of making such an order. In applications for an order for guardianship, a parenting order, or an order for the return of an abducted child, the Family Court can request a person to prepare a cultural report on the child, which may address any aspect of that child's cultural background.<sup>796</sup> The Court can also request a report, before making an order that a child is in need of care or protection, on the "heritage and the ethnic, cultural or community ties and values of the child or young person or the child's or young person's family, whānau, or family group".<sup>797</sup>
- 17.31 A similar power might be considered useful for a Family Court seeking to make an appropriate order for burial directions of a deceased who is Māori. Provision could be made in such cases for the Family Court Judge to request a report, or to make a request for a person to speak to the Court, on the cultural or tikanga implications of the case and/or the importance of tikanga to the deceased and/or their family. There may also be flexibility for a Māori Family Court Judge or a Family Court Judge who has specific understanding or experience of tikanga to hear the case.

## **UNAUTHORISED REMOVAL OF THE BODY**

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- 17.32 The final issues we discuss in this chapter are:
- what legal or policy reforms, if any, are required to address the issue of unauthorised removal of the body; and

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795 See Te Ture Whenua Māori Act 1993 Review Panel *Discussion Document* (Wellington, March 2013) < [www.tpk.govt.nz](http://www.tpk.govt.nz) > .

796 Care of Children Act 2004, s 133.

797 Children, Young Persons and the Families Act 1989, s 187.

- the nature of any potential remedies where the body has been removed and has been buried unilaterally despite the wishes of other interested parties.

### Unauthorised removal

- 17.33 One party to a dispute may attempt to interrupt the legal process by removing the body and attempting to carry out their own wishes without the consent of others. In general, we think the risk of this arising is small, although if it does occur, the parties involved may be required to act quickly.
- 17.34 An option that confers jurisdiction on the Family Court to make burial orders might assist in this situation. Family Court duty judges are able to deal with applications without notice on the same day they are made. While the High Court is also able to issue urgent orders without notice, it might be seen by the parties involved as a less accessible forum than the Family Court, which tends to be less formal and which is more obviously designed to deal with family matters. We also note that High Court registries, where the urgent orders will need to be filed, are spread less widely throughout the country than those of the Family Court.
- 17.35 Increasing public awareness could also help address this issue. Community groups and professionals could play a greater role in helping avoid or manage the risk of a body being taken. Our preliminary discussions with funeral directors suggest they are sensitive to the potential for dispute. They may be in a good position to advise parties on the legal position, particularly if it is clarified in statute, and to either help them resolve the dispute or refer them to the court. Community law centres often publish resources for families organising a funeral; these could include a statement of the law relating to disposal of the body where a dispute arises.<sup>798</sup> Lawyers dealing with the will may also be in a position to assist and should be aware of the potential for disputes about disposal to arise.<sup>799</sup>
- 17.36 Māori wardens or local kaumātua might be able to help with disputes involving tikanga Māori. Nin Tomas notes that aspects of the decision-making process under tikanga can be baffling to outsiders and are not always spelt out explicitly.<sup>800</sup> This may have been part of the problem that led to the dispute in *Takamore v Clarke*.<sup>801</sup> Kristin Smith makes the point that increased communication in the bi-cultural realm is critical.<sup>802</sup>
- 17.37 These awareness-raising measures might help mitigate the risk that a body could be taken without consent, thus requiring the intervention of the law. It might also mean that those who foresee the potential for a burial dispute arising upon their death will be more alert to the need to discuss it in advance with family members in order to avoid or minimise or address the basis for dispute.

### Remedies

- 17.38 The proposals we suggest above in relation to Family Court burial orders would help avoid the risk of proper legal process being circumvented by removal of the body. However, it is possible

798 See, for example, *A Guide to Death, Funerals and Small Estates* (Whitireia Community Law Centre, Porirua, 2002).

799 In *Re JSB (A Child)* [2010] 2 NZLR 236 (HC), which concerned a potential dispute over the imminent death of a child, the lawyer for the child played a crucial role in managing the situation to avoid a dispute arising: See Mark Henaghan “Family Law After Death: Control of the Dead Body of a Child Killed by the Actions of a Parent” (2010) NZFLJ 263. Note also Mike Watson “Coroner urges ‘body snatching’ mediation” (11 June 2012) Stuff < www.stuff.co.nz >.

800 Nin Tomas “Who Decides Where a Deceased Person Will Be Buried – Takamore Revisited” (2008-2009) 11-12 Yearbook of New Zealand Jurisprudence 81 at 98-99.

801 At 92.

802 Kristin Smith “Finding a place to rest: perspectives on kiri mate, kawē mate and hahunga in the context of the ‘bodysnatching’ debate” (Te Kāhui Kura Māori, 2010) < www.nzetc.org >.

that the body could be taken and disposed of before the parties have the opportunity to seek a burial directions order or go through mediation, or before one of the parties exercises their legal right in respect of the body (if the statutory regime eventually recognises such a right: see chapter 16).<sup>803</sup>

### *Orders for disinterment*

- 17.39 If the body is buried, the question is whether any person should be entitled to a licence to disinter the body and who should decide. In the normal course of events, applications for disinterment licences are considered by the Ministry of Health, but only in circumstances where there is no family conflict. If there is, Ministry policy is not to make a decision on the application.<sup>804</sup>
- 17.40 In *Takamore v Clarke*, several members of the Supreme Court suggested that in such a scenario, the High Court should determine whether disinterment may proceed, because it is able to consider the public interest and the interests of those affected by the proposed disinterment.<sup>805</sup> We note that a court order may be regarded as a procedural hurdle; however, we agree with that view and think that a court order should be required in such circumstances, as the court is the appropriate body to weigh up the range of issues involved. We propose though that the jurisdiction for granting such orders should be conferred on the Family Court, to complement the role proposed for it in relation to burial orders.
- 17.41 We have considered whether the Act or its replacement might include guidance for a Court that is being asked to make a disinterment order in these circumstances. Guidance could include, for instance, the need to consider the potential detrimental effect of disinterment on all interested parties, and the need to consider the potential detrimental effect on certain parties of leaving the body in its existing location.<sup>806</sup> It may be that a high threshold is required to make such an order if there is a general feeling that bodies, once buried, should not be disinterred.<sup>807</sup> We would welcome people's views on that.

### *Remedies in case of cremation*

- 17.42 The situation is more difficult if the body has been removed without consent and cremated, and ashes are all that remain. We have not come across any reported New Zealand legal case in which this occurred.<sup>808</sup> In practice, it is likely to be diverted by existing regulatory safeguards, including:
- that no cremation may be carried out unless an application has been made under the Cremation Regulations (form A, Schedule 1);
  - that the application must usually be signed by an executor or near relative of the deceased and they must certify whether any other near relative has objected to it;
  - the requirement for a medical referee to certify the death of the deceased and to issue a final "permission to cremate" form before cremation goes ahead;

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803 For instance in Mr Takamore's case, his partner (and executor) Denise Clarke succeeded in obtaining an injunction to prevent burial going ahead and for Police to take custody of the body, but it was apparently not enforced because the Police arrived as burial was already taking place and did not want to risk a confrontation with family members. See Nin Tomas "Ownership of Tūpāpaku" (2008) NZLJ 233 at 233.

804 We discuss the process for disinterment licences and potential reform considerations in ch 18.

805 *Takamore v Clarke* (SC), above n 764, at [89].

806 See also the list of potential interests outlined in ch 18 at [18.72].

807 See the discussion in Peter R Kehoe "Cemetery Abandonment and Disinterment of Human Remains" (1970-1971) 35 Alb L Rev 320.

808 See however Mike Watson "Coroner urges 'body snatching' mediation" (11 June 2012) Stuff < [www.stuff.co.nz](http://www.stuff.co.nz) > .

- that any cremation other than in a crematorium must be approved by the Medical Officer of Health;<sup>809</sup> and
  - the offence provisions in the Burial and Cremation Act relating to unauthorised cremation or giving a false certificate to procure cremation.<sup>810</sup>
- 17.43 We also discussed options in chapter 9 to strengthen the regulatory regime applying to crematoria that could reduce the risk of someone being able to controvert any new statutory regime by cremating the body without consent or authority.
- 17.44 On the slim chance that an unauthorised cremation does occur, s 150 of the Crimes Act 1961, which contains an offence of “improperly or indecently interfering with human remains”, might apply. We suspect though that in most cases prosecutorial discretion would go against bringing criminal proceedings in burial disputes, unless something truly egregious occurs.<sup>811</sup> At the heart of these disputes is the desire to do what is thought to be best for the deceased and/or their family, and in such circumstances, criminal proceedings may not be appropriate.
- 17.45 Any criminal proceedings would be independent of any civil remedy or orders that could be sought by those who did not consent to the cremation. The family could conceivably bring an action in tort for intentional infliction of emotional distress against the party who instigated the unauthorised cremation. It is unlikely that a court would recognise a tortious claim in conversion, as that would rely on recognising a property right in the body.<sup>812</sup>
- 17.46 If the body were taken from a funeral home and cremated without authority, in certain circumstances it might be possible to bring a tortious action in negligence for failing to exercise due care towards the body. United States courts have recognised actions brought in negligence by survivors of the deceased for a funeral director’s failure to take reasonable care in carrying out their duties.<sup>813</sup> Claims of outrageous conduct<sup>814</sup> or intentional infliction of emotional distress<sup>815</sup> have also been brought against funeral directors for conduct such as releasing a deceased’s remains to his former wife, despite knowing that she was not authorised to receive the remains,<sup>816</sup> or holding a body to secure payment of charges.<sup>817</sup>
- 17.47 A provision requiring funeral directors or funeral service providers not to provide services unless they have a written authorisation from the person who has the right of decision could possibly be included in the statute.<sup>818</sup>

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809 Cremation Regulations 1973, reg 4.

810 Burial and Cremation Act 1964, s 56.

811 We note that South Australia has recently introduced criminal sanctions for proceeding with a cremation despite knowing there is a dispute. The Burial and Cremation Act 2013 (SA) provides in s 9(3) a maximum penalty of \$10,000 for a person who causes bodily remains to be disposed of by cremation if the person “knows or is aware that a personal representative or a parent or child of the deceased objects to this method of disposal”. In addition, a cremation permit is required before cremation may proceed. Section 10(7)(a) provides that a cremation permit similarly may not be issued if the Registrar “knows or is aware that a personal representative or a parent or child of the deceased objects to this method of disposal”. There is an exception to these provisions if the deceased directed by will that his or her remains be cremated. Finally, s 10(8) provides that if the Registrar “becomes aware of a dispute as to who may be entitled at law to possession of the body for the purposes of its disposal, the Registrar may refrain from issuing a cremation permit in respect of the body until the dispute is resolved.”

812 See the discussion in R N Nwabueze “Interference With Dead Bodies and Body Parts: a Separate Cause of Action in Tort?” 15 Tort L Rev 63.

813 Dead Bodies 22A Am Jur 2d § 113.

814 Fright, Shock, and Mental Disturbance 38 Am Jur 2d §§ 4–7.

815 *Holland v Edgerton* 355 SE 2d 514 (NC App 1987); *Sherer v Rubin Memorial Chapel Ltd* 452 So 2d 574 (Fla App 1984).

816 *Rekosh v Parks* 735 NE 2d 765 (Ill Dist Ct App 2000).

817 *Levite Undertakers Co v Griggs* 495 So 2d 63 (Ala 1986).

818 See for example s 8(1) of the British Columbia statute, above n 774, and subd 6 of the Minnesota statute, above n 779. That would depend on the preferred statutory regime as discussed in ch 16.

17.48 We think the likelihood of a body being cremated in these circumstances is low. It may be that existing safeguards combined with other measures discussed in this Issues Paper might be considered sufficient.

#### CONSULTATION QUESTIONS

Q18 Irrespective of who makes the decision or what factors they take into account, there will be times when a serious dispute arises and access to a legal forum is needed. Do you support the option of giving the Family Court the responsibility for dealing with burial and cremation disputes?

Q19 Do you support the option of giving the Māori Land Court concurrent jurisdiction in cases involving Māori customary law where all parties agree the dispute be heard in that forum?

#### *Additional questions*

17.49 In addition to these high-level questions, we would be interested in receiving submissions on the following specific questions, from those who have a view:

- (a) Do you think more statutory guidance is needed about how burial disputes should be resolved by the courts? Should legislation set out a list of factors to which a Court must have regard when determining a dispute?
- (b) If so what do you think these should be? For example:
  - a requirement to have particular regard to the feelings of any person, such as the spouse or partner of the deceased?
  - a requirement to have regard to the cultural or spiritual practices of the deceased? Should that also extend to having regard to the cultural and spiritual practices of their family?
  - a requirement to have regard to the wishes of the deceased, based on the evidence available to the Court?
  - a requirement to take into account matters of practicality and convenience?
  - an overarching requirement to have regard to the potential effect of making any order on the tikanga that is practised by the whānau or hapū of the deceased?
- (c) Do you have any views or comments about any issues relating to court jurisdiction, procedure and remedies?

# Chapter 18

## Decisions about ashes, memorialisation, additional interments, and disinterment

### INTRODUCTION

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- 18.1 In Part 4 we ask how the law should facilitate decision making about burial and cremation, and the resolution of fundamental disputes where these arise. In this chapter we conclude our review with a discussion of what we describe as “secondary decision making” that families can face after the burial or cremation has taken place. Here we assess the adequacy of the legal tools and mechanisms available to resolve disputes that may arise in these different contexts.
- 18.2 The matters over which the bereaved may have to make decisions in the aftermath of a death are quite varied, and the sources of disagreement equally so. For example, decisions may need to be made about what to do with the ashes of the deceased, or what should be included on any memorial inscription. At a later stage – sometimes generations later – questions may arise about whether additional interments (bodies or ashes) can be made in an existing family grave. Occasionally someone will seek permission to disinter a body from a grave for burial in another place.
- 18.3 Most often these decisions will be made amicably and after appropriate consultation. However, from time to time, the decision making process will not be straightforward, either because a family member has a strong objection to what is proposed, or because there is no clarity about who actually has the legal authority to make the decision in the first place. As with disagreements over burial, many different factors can contribute to disputes over these secondary decisions, including conflicting values and beliefs and the breakdown of marriages and family relationships.
- 18.4 The Burial and Cremation Act 1964 (the Act) does not address these questions and there has been very little case law on these points. Although the Supreme Court decision in *Takamore v Clarke* has confirmed the lead role of the executor in determining the burial location, the extent to which the executor can or should be involved in any secondary decision making after burial or cremation have taken place remains unclear.
- 18.5 The small number of cases means there is limited jurisprudence and case authority to guide future courts faced with these issues. The basis on which the parties may bring such disputes before the courts is also unclear. Overseas precedents may provide some assistance, but will not necessarily reflect local circumstances.

### PRINCIPLES AND KEY PROPOSITIONS

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- 18.6 The principles we consider relevant to this discussion are broadly the same as those that informed our approach to decision making and dispute resolution in the context of burials.

Respect for the dignity of the deceased and, by extension, respect for human remains in the form of ashes is fundamental.

- 18.7 However, there are also important differences. Firstly, ashes are not the same as bodily remains: unlike human bodies, they are not subject to further decomposition and they can be possessed, divided, and even transformed into objects such as jewellery and memorials:<sup>819</sup>

The physical change caused by cremation has enabled people to bring disputes before the courts that would be inconceivable if the deceased was still in bodily form. ...

The physical form of ashes allows them to be carried, moved and generally treated with an ease that is not possible for bodies ... the physical transformation caused by cremation lessens their corporeal quality, or perhaps even extinguishes that quality. It is, therefore, not surprising that ashes are moved about and argued over in ways that do not occur with bodies.

And while discussions about the treatment of ashes can give rise to deeply felt cultural concerns, they do not involve public health issues.

- 18.8 Secondly, control over memorials and memorial inscriptions also raise different legal and policy issues. Memorials are private property but they exist in a shared public space and are attached to publicly owned land. The right to freedom of expression is relevant when considering what constraints are placed on inscriptions, but so too are the rights of the public and other families with neighbouring plots who make use of this shared space.<sup>820</sup> In the course of this review we have been made aware of situations where intractable and lengthy disputes have arisen among family members over who has the right to determine what inscriptions are made on a memorial. Sometimes the dispute may arise within a family when someone wishes to add a name to a memorial or alter the wording of an inscription. In other cases the dispute may arise between the persons erecting the memorial and the cemetery managers.
- 18.9 Thirdly, the legal and policy framework within which decisions about disinterment are made may involve health and safety issues, but the more challenging policy problem is determining the circumstances that justify disturbing human remains and who should be authorised to make such decisions. The authority to decide is also frequently an issue when considering the circumstances in which additional interments can be made in an existing grave, given that the original plot holder is deceased and there may be no clear line of authority among surviving kin.
- 18.10 While some may question whether these disputes require a legal response, to the participants these seemingly petty issues may take on a huge significance. The absence of a clear legal framework for such decisions may lead to more protracted disputes. For those caught up in such disagreements, these issues may bring to bear intensely held emotions and beliefs. In the course of our initial consultation, local authorities and representatives of the funeral and cremation sector also impressed upon us the fact that disputes in these areas are becoming increasingly common. Some felt the current legal framework did not provide the level of clarity and assistance that is now required for those who find themselves attempting to mediate disputes over these matters.
- 18.11 Based on our preliminary understanding of the scope of the problem, we accept that greater legal clarity is needed about who has decision-making authority and how these disputes are resolved. However, as a matter of principle, we believe the law and the courts should only become engaged in the most serious and intractable cases. In the majority of cases we think that clearer and more definitive contracts, guidelines and policies will prevent disagreements arising,

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819 Matthew Groves "The disposal of human ashes" (2005) 12 JLM 267 at 270–272 as cited by the Queensland Law Reform Commission *A Review of the Law in Relation to the Final Disposal of a Dead Body* (QLRC R69, 2011) at [7.27].

820 See ch 5.

or at the very least provide a clear indication of the respective rights and obligations of different parties.

- 18.12 Our view is that court processes (including alternative dispute resolution) should be reserved for disputes about the secondary decisions relating to the custody of ashes, memorialisation and disinterment. Although family disputes may potentially arise over a range of other secondary decision making (such as where or whether the ashes should be scattered or interred) we consider that there may not be a strong enough policy justification for the intervention of the courts, and that these disputes should therefore continue to be handled by families with the support of funeral and bereavement services (including bereavement counselling) and better contractual arrangements.
- 18.13 However, we think the specific issues of memorialisation and the custody of ashes (particularly where there has been a relationship breakdown)<sup>821</sup> may warrant dispute resolution processes being available where necessary and as appropriate. The issue of disinterment also requires Court oversight (as confirmed in *Takamore v Clarke*).<sup>822</sup> Burial disputes that involve additional interments may also fall within the jurisdiction of the courts and the considerations and questions in chapters 16 and 17 will be relevant. In this chapter we outline possible supplementary options to improve clarity in this area, with a view to reducing the potential for such disputes to arise.
- 18.14 The role of judges as arbiters in burial and related disputes must be reserved for the most serious cases. There must be a sufficient policy rationale to justify the resources and expertise of the courts being directed to these issues. Circumstances in which there is fundamental disagreement about the primary decisions of whether to bury or cremate and the location of burial site (the subject of chapter 16) can be expected to meet this seriousness threshold, justifying development of a particular statutory regime and the involvement of the courts in resolution. Such decisions arise in the sensitive period prior to final disposition of the body of the deceased, and disputes can delay that final disposition.
- 18.15 In the following discussion we traverse the specific policy and legal challenges arising in the different contexts within which secondary decisions are made about the treatment of ashes, memorialisation, subsequent interments and disinterment. We also put forward options for dealing with the issues raised in each of these decision-making contexts.

## HUMAN ASHES

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- 18.16 Two significant legal and policy issues arise in the context of decision making about human ashes. The first relates to who has the right to make decisions about the treatment of ashes and how disputes should be resolved. The second relates to the public interest in placing legal or policy controls on what happens to ashes.

### Personal possessory interests

- 18.17 Potentially, disagreement may arise among family members about what to do with the ashes of a loved one. Some may wish to retain the ashes, others to divide them. Some may wish to scatter the ashes, others to inter them. If ashes have been retained by relatives of the deceased who subsequently separate or become embroiled in a personal conflict, disputes can arise about who should possess the ashes. We expect however, that most families are able to reach a resolution

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821 One option might be to consider custody issues relating to ashes under the relationship property jurisdiction of the Family Court (where the dispute arises in the context of a relationship). However, the fact that human remains in the form of ashes have a unique and special status may require a different response.

822 *Takamore v Clarke* [2012] NZSC 113, [2013] 2 NZLR 733.

of their differences and accept a decision or compromise in the interests of laying the issue and their loved one to rest. However, the potential exists for legal disputes to arise, and for tangible items such as ashes to be the focus of any such dispute, especially where the parties are estranged and there has been a pattern of dispute between them.

18.18 One example of a dispute concerning ashes is the Australian case, *Leeburn v Derndorfer*,<sup>823</sup> where two sisters interred the ashes of their father at a local cemetery without the consent of their brother. Two years later the brother sought to disinter and divide the ashes, to inter a portion in a cemetery near his home. Although the judge declined to grant the order given the lapse of time and the strong objection of one sister to dividing the ashes, the judge accepted expert evidence that dividing ashes is not an uncommon practice and that, in appropriate cases, courts might authorise or direct a division.<sup>824</sup>

18.19 This case is also authority for the proposition that ashes may be owned or possessed, (unlike the rule that there is no property in a human body, discussed in chapter 14):<sup>825</sup>

So long as they are not dispersed or otherwise lose their physical character as ashes, they may be owned or possessed. ... Ashes which have been preserved in specie are the subject of ordinary rights of property, subject to one possible qualification. ... The only qualification which, if it exists, may require some working out, arises from the fact that the ashes are, after all, the remains of a human being and for that reason they should be treated with reverence and respect.

18.20 Our preliminary view is that Family Court processes would be suitable for addressing such disputes when they have become intractable – firstly and primarily through Family Court counselling and mediation, with the ability to seek court orders in appropriate cases. The option proposed is consistent with the option raised in the previous chapter that the Family Court and its attendant processes might be best suited for dispute resolution in relation to primary decision-making such as the place of burial. One way to filter the cases concerned with secondary decision-making that reach the court would be to require the leave of the court for an application to be heard. This would reduce the potential number of cases reaching the court, and could encourage real engagement by the parties in alternative dispute resolution. However it would retain access to the courts for any particular case that warrants a judicial hearing.

18.21 If the Family Court is to be the preferred forum to handle such disputes, we must ensure that the court has jurisdiction to do so. It is doubtful that it does at present. Legislation should be considered that clearly sets out the right to apply to the Family Court for specific orders. Alongside such statutory right would be use of the Family Court’s alternative dispute resolution methods, which are currently being reformed but the focus of which is mediation. The proposed family dispute resolution service<sup>826</sup> seems conceptually broad enough to be ideally suited for disputes of the sort we are referring to here, to be referred for resolution in the first instance.

18.22 It may also be necessary to assess whether a clearer statutory articulation of the parties’ rights and responsibilities would be useful, both as a means of reducing the potential for dispute, and as a means of directing the parties towards possibilities for resolution should a dispute arise. This should improve the effectiveness of alternative dispute resolution. Elements of the statutory framework in relation to burial decisions and disputes discussed in chapter 16, which

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823 *Leeburn v Derndorfer* [2004] VSC 172, (2004) 14 VR 100; see Matthew Groves “RIP: Families, Funerals and the Law” (2006) 80(1-2) LJ 54.

824 Compare *Fessi v Whitmore* [1999] 1 FLR 767 where a submission requesting division of the ashes was rejected as “wholly inappropriate”; *Doherty v Doherty* [2006] QSC 257; *Robinson v Pinegrove Memorial Park Limited* (1986) 7 BPR 15, 097. See Eloisa C Rodriguez-Dod “Ashes to Ashes: Comparative Law Regarding Survivors’ Disputes Concerning Cremation and Cremated Remains” (2008) 17 Transnational Law and Contemporary Problems 311.

825 *Leeburn v Derndorfer*, above n 823, at [27].

826 Family Dispute Resolution Bill 2012 (90-3F).

require identification and weighting of relevant interests, could be influential in relation to secondary decision making disputes such as those concerning the custody of ashes.

### Scattering or burying ashes on public land

- 18.23 Under the current legal framework there is a great deal of flexibility and freedom about disposing of ashes, although under tikanga Māori, as human remains are tapu, there are cultural restrictions as to the places where it is not permitted. Otherwise there is currently no legal restriction on the disposal of human ashes.<sup>827</sup> Some local authorities have developed policies to provide public guidance for their district, but in other areas very little guidance is available. The terms of reference for this review asked us to consider whether nationally consistent guidelines are required to regulate the dispersal of ashes to avoid cultural offence and nuisance.
- 18.24 Ashes can be scattered or buried in a place the deceased person enjoyed spending time, or which had special significance to him or her. The ashes might be scattered in a private garden or on a farm, at a beach, or any other public place, or at sea. If cremation has been chosen for cultural or religious reasons, cultural or religious imperatives might also dictate where or how the ashes are dispersed. For instance, New Zealand Hindu may prefer to release ashes into flowing water, reflecting the original practice of releasing ashes into the Ganges to free the spirit of the deceased.
- 18.25 The right to inter or scatter ashes can also be purchased. Many cemeteries sell plots where ashes can be interred or offer a place in a columbarium (a room or building with niches where urns can be stored). A private body may also sell the right to inter or scatter ashes on their land. An example is Eden Garden, a well-established garden run by a trust and located in a former quarry in Auckland. It offers guided tours, a café, and ash interments and memorials (shrubs, trees and seats).
- 18.26 We do not have figures on how many people choose to scatter ashes, but it is reasonable to assume that given the relatively high ratio of cremation to burial, and the lack of any cost associated with scattering ashes in public places compared to the interment or scattering of ashes on private land, many people are making the choice to dispose of human remains in a public place. It may have been the reason why cremation was chosen – it provides more flexible options for disposing of ashes in a particular place, compared to burial which is largely restricted to public cemeteries or denominational burial grounds, as discussed in Part 1.
- 18.27 The freedom to scatter ashes in a public place needs to be balanced against the wider public interest and the interests of those with a particular right or interest in the place where ashes are scattered. For people who work in these spaces or who visit and enjoy them it can be unpleasant or might cause offence for people to see ashes being scattered in public areas and ashes left visible. Offence may also be caused for cultural reasons, depending on where and how the ashes are disposed of.
- 18.28 There is also a risk that the ashes may be disturbed, causing offence and upset to the person or family who scattered or buried them, for example, if the place where they are scattered is a garden where the soil is regularly replaced, or there are other earthworks. Natural memorials planted by families may also be disturbed or removed by those looking after the land who do not realise their significance. This may indicate that more guidance and information about the choice of location for the ashes would be helpful so that people have a greater awareness and

<sup>827</sup> The Health Act 1956, s 29, defines certain acts that are injurious to public health to be a nuisance; however, the scattering of ashes is unlikely to endanger human health.

understanding of the implications of their choice, both for their own peace of mind, and to appreciate the potential impact on others.

- 18.29 Tikanga Māori places restrictions and conditions on the handling of human remains, including ashes, which are tapu. The Ministry of Health’s internal guidance notes that consultation with iwi and hapū is appropriate where a local authority receives an application to dispose of ashes at sea or on culturally or spiritually significant land, lakes or rivers, as the scattering of ashes in these waterways may contravene Māori values and protocols:<sup>828</sup>

Where for instance these waterways are used either for bathing or as a source of food or water, any contact with human remains undermines the sanctity of the waterways and their environs and they cannot be used for their customary purposes until the appropriate rituals have been performed.

- 18.30 Local hapū and iwi will probably wish to be consulted before ashes are scattered in certain areas, particularly if the area has tapu status. Releasing ashes into water may be prohibited under tikanga, especially if the body of water is used as a source of food. As well as these tikanga-based concerns, where local hapū or iwi have customary usage or management rights, restrictions may be imposed on the disposal of human remains in these areas.<sup>829</sup>
- 18.31 At present there is minimal regulation of the scattering and burial of ashes in public areas. As a matter of best practice, people are advised to seek local authority approval before scattering ashes. Sometimes Ministry health protection officers are asked for guidance. Local authorities can pass bylaws dealing with the practice or may publish information for local residents. They are not required to designate areas where people can dispose of ashes in an appropriate manner, although some do.

#### *Is there a problem?*

- 18.32 Media have reported on ash scattering in public areas causing offence to locals.<sup>830</sup> A number of local authorities also expressed concern about the unregulated dispersal of ashes in the survey carried out for this review.<sup>831</sup> Wellington City Council reported “unwanted” ash scattering in the Botanic Garden Rose Beds and areas in the town belt.<sup>832</sup> Auckland City advised that, due to the increasing diversity of the regional population, more cases were being reported of members of the public disposing of ashes in public spaces and waterways and that this is causing issues. New Plymouth noted that tangata whenua had expressed a concern about ash scattering and a desire for clearer policies around this practice. Environment Southland was uncertain about the approach in areas over which Ngāi Tahu has statutory rights.
- 18.33 Our initial research suggests that most local authority bylaws do not deal comprehensively with scattering ashes in public. We have found few bylaws stating where and how this may be done. While responses to our Local Authority Survey suggested that some local authorities have bylaws or legal processes to deal with the issue, our initial research suggests that such bylaws are limited to the interment of ashes in local authority cemeteries.
- 18.34 Some local authorities release policies, plans or guidance on the scattering of ashes. An example is the Wellington City Council Commemorative Policy, which allows for scattering and interment in “re-vegetation areas” and “parks and reserves with low to moderate public use”

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828 Ministry of Health *Environmental Health Protection Manual* (June 2004).

829 The Wellington City Council Commemorative Policy provides that the Council, the Wellington Tenth's Trust and Te Runanga o Toa Rangatira Incorporated are responsible for identifying suitable sites for scattering ashes.

830 Joseph Aldridge “Scattering ashes on Mauao causes locals concern” *Bay of Plenty Times* (online ed, 3 October 2012).

831 Law Commission “Survey of Local Authorities” (November–December 2010) [Local Authority Survey].

832 See Wellington City Council “Scattered ashes cause angst in rose garden” (21 April 2010) < [www.wellington.govt.nz](http://www.wellington.govt.nz) > .

and also states where ash scattering is prohibited.<sup>833</sup> The policy states that an application must be made through the Council, which will consult with local iwi and, if it declines the application, suggest alternatives. If it approves the activity, the Council keeps a record of where the ashes were scattered.

- 18.35 It is clear that some local authorities have developed processes for managing the competing interests involved in the scattering of ashes in public places, although it is not clear how well known these processes are among the public. It is also clear that the approaches of some local authorities are more developed than others, raising a question as to whether it would be desirable for a more consistent approach. It may be that the scattering of ashes is not a prominent issue in districts with low population density; although even in such areas, there may be cultural concerns about the practice, even if it occurs infrequently. We are interested in feedback from the public and from interested groups about the extent to which the lack of consistent controls and guidance on the scattering of ashes in public places is regarded by New Zealanders as undesirable. Once we have a clearer idea of the extent of the problem and strength of public feeling, a range of approaches is possible.
- 18.36 Given the cultural dimensions to the issue, it seems that more could be done to meet the needs and expectations of the bereaved, the community and local iwi in relation to the scattering of human ashes in public places. In particular areas of New Zealand, increasing cultural and religious diversity means the need for culturally appropriate options for dispersal of ashes is likely to become more, rather than less, pressing.
- 18.37 At present, as a matter of best practice people are advised to seek local authority approval before scattering ashes; however, we expect that few people actually do so. We wonder whether a more effective and realistic approach would be for local authorities to proactively provide guidance and information to the public, as some already do.
- 18.38 It would be worth considering whether there are mechanisms to better inform the public of cultural prohibitions when they choose their location for human ashes. Some local authorities have developed policies following consultation with local iwi. It would be desirable for these policies to be readily available to the public; one option would be for funeral services providers to bring these policies to the attention of the family when the ashes are returned to them following cremation. If local authority policies are readily available, then funeral directors could inform families of the approach taken in any particular part of the country when the family indicates that the ashes will be scattered outside the local district.
- 18.39 Local authorities could be required or encouraged to pass bylaws dealing with ash scattering, where there is sufficient demand for controls in a particular area. That would permit the appropriate local processes to be given effect, including consultation with local hapū or iwi. However, the challenge will be to ensure that such bylaws receive enough publicity so that the controls are observed by the public.
- 18.40 One option might be to require local authorities either to designate appropriate spaces for the scattering of ashes, or to identify places where the practice is not permitted following consultation with local hapū and iwi. This may help to meet the cultural needs of particular groups. In chapter 7 we raised the possibility of opening up older cemeteries for the interment of

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833 The Council's Commemorative Policy (February 2006) describes areas that are unsuitable for scattering and interring ashes – areas of cultural or heritage significance (eg Māori heritage sites), high public use sites (eg sports fields or rose gardens at botanic gardens), sites that have extensive upgrades, renovations or excavations, unsafe sites (eg steep hillsides). The primary aim of the policy is around the placement, management and recording of commemorative memorials in the city, with the secondary aim of managing requests for scattering and interring ashes and other human remains on public land in a culturally sensitive manner.

ashes, which may provide additional options for families with connections to these cemeteries through previous generations.

- 18.41 Another option identified in our terms of reference is nationally consistent regulations so that the dispersal of ashes avoids cultural offence and nuisance. The advantage of regulations might be higher prominence being given to the issue resulting in greater public awareness of any restrictions. However, this option might not be sufficiently flexible for the needs of different communities.
- 18.42 We therefore welcome feedback on the nature and the extent of the problem in any particular part of the country, and the nature and extent of any desired reform.

## MEMORIALISATION

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- 18.43 As noted, dispute can arise about how to memorialise a burial or interment site, particularly in situations of relationship breakdown.
- 18.44 One example is *Watene v Vercoe*<sup>834</sup> where the parents of a child were unable to agree on the appropriate wording of the inscription on the headstone of the child's grave and applied for orders to the District Court under the Guardianship Act 1968. Ultimately the judge dismissed the application as being outside the jurisdiction of the Guardianship Act.<sup>835</sup> But the judgment proceeded on the basis that, had there been an executor, they would have the right to make burial arrangements, including the inscription of the headstone.<sup>836</sup>
- 18.45 The Judge also suggested that section 9 of the Burial and Cremation Act (which provides that the local authority may permit the erection of any monument or tablet "as it thinks proper") may impose a role on the local authority as a cemetery manager to help resolve such disputes.<sup>837</sup>
- 18.46 However, we approach this suggestion with caution; while cemetery providers will no doubt be sensitive to the different needs of families, it may not be desirable to require or suggest that they take on any formal substantive role in family dispute resolution. In our view, the review of the decision-making framework in chapter 16 provides an opportunity to consider other possibilities.
- 18.47 The option we raise for consultation is that these disputes could be treated similarly to disputes about the custody of ashes. As we suggest above, disputes about custody could be directed to the Family Court resolution processes. We think that this may also be an appropriate option for the memorialisation disputes that occasionally arise. Like the custody of ashes, the potential for memorialisation disputes to arise in situations of relationship breakdown suggests that Family Court processes could be suited to dealing with the nature of the dispute and the underlying issues.
- 18.48 It would be necessary to clarify the Family Court's jurisdiction to handle such disputes. Legislation that clearly sets out the right to apply to the Family Court for specific orders would need to be considered, thereby providing access to the Family Court's alternative dispute resolution methods. We expect that the Family Court resolution processes would assist in the majority of cases and that not many cases would require a formal order from the court.

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834 *Watene v Vercoe* [1996] NZFLR 193 (DC).

835 At 199. The Guardianship Act 1968 was repealed by the Care of Children Act 2004, s 152.

836 At 195–196.

837 At 199.

## ADDITIONAL INTERMENTS

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- 18.49 Responses to our Local Authority Survey reported a growing trend of families opting to bury a deceased family member or inter their ashes in an existing family grave, a trend that seems to be partly driven by burial costs, but also by the location and ambiance of a particular cemetery or because of family connections.<sup>838</sup> Requests to inter ashes in existing graves are particularly common in older cemeteries that no longer have capacity for new burials.<sup>839</sup> However, requests for additional interments involving burial can put cemetery managers in the difficult position of determining who has the authority over the plot to give consent.
- 18.50 For closed cemeteries and burial grounds, the Burial and Cremation Act expressly provides that certain close relatives may be buried in the same plot as the deceased, although it does not rank the priority of the relatives if there is a dispute over who should be buried.<sup>840</sup> But in other cemeteries, the authorisation of appropriate family members for an additional interment is required. If there is a surviving spouse, children or executor of a person already buried in the plot, it may be appropriate for them to make this decision. Alternatively, there may be clear plot-holder rights established through a contract for a “right of interment”. However, in many cases the immediate kin may themselves be deceased, the executor may be unknown (if one has been appointed), or it may be unclear who the appropriate decision maker is because of the time elapsed.
- 18.51 Cemetery managers can face the challenge of determining when approval of such requests should be sought and who should provide it, when there is no directive in the original deed and when the executor of the deceased’s estate may be either unknown or no longer alive. The problem is most acute when family members object to the new interment, as outlined by the Buller District Council in its response to our Local Authority Survey:<sup>841</sup>
- Generally they are disputes between family members when one member wishes to add either ashes or a body to what is a family plot which usually contains elderly parents or grandparents and other members of the family object to the addition of the particular person. The difficulty is as time goes on who actually has the right to say who can, or cannot, be added to a plot?
- 18.52 Additional interments may also necessitate the removal and reburial of remains at a greater depth, if the plot was not originally established as a double-depth plot. Under current law, this requires a disinterment licence, a process we outline below. This process provides some level of additional oversight, although family members may also disagree on whether to disinter, and resolving these disagreements can be challenging.

### Reform options

- 18.53 We suggest in chapter 7 that clearer statutory defaults could provide greater certainty about the nature of these rights, and help prevent disputes arising. These would not be compulsory, and it would be possible to opt out on a case-by-case basis, for example through the agreement for plot purchase or through a will.
- 18.54 Statutory defaults could provide greater certainty about who is entitled to exercise plot-holder rights once the first deceased family member has been buried. For example, the statute could provide that the spouse of the deceased would hold the first right to a subsequent burial in a double-depth plot, then the children of deceased, and so on. The statute could also clarify

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838 See Waikato District Council “Cremated Ashes in Cemeteries” (press release, 30 July 2012).

839 See ch 3.

840 Burial and Cremation Act 1964, s 42: the relatives included are a spouse, civil union or de facto partner, child or sibling of the deceased.

841 Local Authority Survey, above n 831.

whether an individual has the right to consent to an additional interment, or whether consensus between close surviving relatives is required. The exact detail of statutory defaults would be informed by consultation on this Issues Paper, and we suggest that they should be broadly consistent with whatever framework is favoured for burial decision-making rights as discussed in chapter 16.

- 18.55 A second option (as an alternative or in addition to statutory defaults) would be to develop a model contract for plot purchase, also suggested as an option for reform in chapter 7. A model contract could perhaps contain more detail than the statutory defaults.
- 18.56 A third approach is for statute to specify the matters that must be addressed in a plot purchase contract. For example, the new burial legislation in South Australia requires the plot contract to include details of the people that are eligible to be interred in the plot or the person or specified class of people that are entitled at some future time to nominate who may be interred in the plot.<sup>842</sup>
- 18.57 We invite submissions to these questions in chapter 7.<sup>843</sup>

## DISINTERMENT OF INDIVIDUAL GRAVES

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- 18.58 Disinterment falls into two broad categories: the disinterment of individual graves, and the disinterment of multiple graves to clear cemeteries for alternative land use such as public works. We have already considered the issues raised by disinterment of multiple graves in chapter 7, and turn now to the decision-making rights in relation to disinterment of an individual body when desired by those close to the deceased.
- 18.59 The removal of a body from its burial place (whether a cemetery, urupā or other place of burial) requires a licence from the Minister of Health.<sup>844</sup> Since 2006, the Ministry of Health has received as many as 60 applications for disinterment each year, although over the last four years the average number of applications has been 40.<sup>845</sup> The main reason for seeking to disinter remains is to rebury the body in a location of greater significance to the deceased's relatives, including burial near family, burial in an urupā or repatriation overseas. Another common reason for disinterment is to allow an additional burial in the same plot or to allow cremated remains to be added to the same plot.
- 18.60 A surprisingly high proportion of disinterment applications are necessary because the deceased was buried in the wrong plot due to a mix up by cemetery staff; since 2006, this situation has accounted for roughly 10 per cent of disinterment applications. Disinterment is also sometimes requested so that the body may be cremated. More rarely, disinterment is requested to rectify an unlawful burial, to move remains because of land subsidence or other environmental factors, or as part of a police investigation.
- 18.61 The Ministry's position is that no licence is required for the disinterment of pre-term fetuses or ashes as these do not meet the definition of "human remains". While the disinterment of ashes can be a sensitive issue, there are two important points of difference between ashes and bodily remains. First, the disinterment of ashes does not raise public health concerns. Second, while ashes in a non-biodegradable and waterproof container will remain undamaged indefinitely,

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842 Burial and Cremation Act 2013 (SA), s 30(1)(a).

843 See questions in ch 7 at [7.109]. Questions raised in chs 16 and 17 will also be relevant in relation to burial disputes that involve additional interments.

844 Burial and Cremation Act 1964, s 51(1).

845 The Ministry of Health issued 36 licences in 2012/2013; 38 licences in 2011/2012; 44 licences in 2010/2011; and 42 licences in 2009/2010.

ashes in a biodegradable container cannot realistically be disinterred. Bodily remains, in contrast, are subject to gradual decay.

- 18.62 Cemetery managers retain overall control of each plot within a cemetery and so also have a role in relation to disinterment. Disinterment fees range from \$1,500 to \$3,600 and cover the labour and machinery costs incurred by the cemetery. In some cemeteries, disinterment will not be permitted by the cemetery manager, because of the risk of damage to other graves or memorials. In addition, some local authorities have included restrictions on disinterment in cemetery bylaws.

## Disinterment – the process

### *Disinterment licence*

- 18.63 Under the common law, there has been a strong presumption in favour of leaving human remains undisturbed. This principle is reflected in the restriction in section 51 of the Act on removing any body from its place of burial without a licence from the Minister of Health.<sup>846</sup>
- 18.64 There are no criteria in the Act to guide decision making for the approval or non-approval of applications for disinterment licences. We have been advised by Ministry of Health officials that the assessment of a disinterment licence application is discretionary and that the authority to issue a licence has been delegated to officials who follow internal guidelines on a case-by-case basis. There is no transparency of decision making or formal review of decisions for consistency.
- 18.65 According to figures from the Ministry of Health, each year about three applications are not granted because of a lack of family consensus. The Ministry also advises that approval will not be given if the reason for disinterment is frivolous.
- 18.66 Currently, any person may apply for a disinterment licence, but they must have relevant documents including a death certificate, written consent or a note of disagreement from relatives, and a note about their relationship with the deceased. These requirements have been developed by Ministry officials. The Ministry considers whether the applicant has notified family or next of kin, or made reasonable attempts to do so. If the deceased person is of Māori or Pacific descent, the Ministry will consider whether consultation with a broader kinship group may be required. In cases where there is opposition or a lack of consensus among relatives the licence application is unlikely to be granted, but the process is flexible and the outcome will depend on the circumstances. The wishes of the partner or spouse, or the executor if any, will have a major influence.

### *Role of the courts*

- 18.67 Prior to the decision in *Takamore v Clarke*, cemetery managers and Ministry officials had proceeded on the basis that no court order was necessary for disinterment to proceed. However, the Supreme Court has now confirmed that an order of the Court is required in addition to the disinterment licence from the Ministry of Health, at least where an application is made to the Court in the context of a dispute.<sup>847</sup>

I would reject the more extreme argument put forward for the executor here under which she requires no authority from the court for reinterment but only licence under the Burial and Cremation Act. That Act is concerned with matters of public health and decency. Wider interests are engaged in disinterment. Those directly affected are entitled to be heard on the executor's proposal. Entitled to

<sup>846</sup> See also Burial and Cremation Act 1964, s 55 for the offence of unlawful exhumation.

<sup>847</sup> *Takamore v Clarke* (SC), above n 822, at [89] per Elias CJ; see also the majority judgment at [159].

consideration, too, is the public interest. The views of the executor may be highly influential (and it is a relevant consideration here that the initial disposal was contrary to her wishes). But in my view the court must determine whether reinterment is appropriate.

- 18.68 Complex legal issues may also come before a court, around the respective rights of the executor and the rights of the holder of the burial plot. In *Pauling v Williams*,<sup>848</sup> the applicant sought to disinter her child's remains from a joint plot in which the child's father had also been buried. Both had died in a car accident two years previously. However, the rights to the plot were held by the child's paternal grandparents, who objected to the disinterment. The grandparents brought proceedings in the High Court to review the decision to grant the disinterment licence and sought an injunction to restrain the disinterment, which they said would amount to an unlawful trespass on the burial plot. The applicant succeeded in the High Court, but the decision was set aside by the Court of Appeal on the basis that the judge had incorrectly characterised the relevant rights. The Court of Appeal also said that the legal rights and duties of the applicant in respect of her daughter's remains had not been adequately considered in the High Court.
- 18.69 Such disagreements raise similar policy issues, and conflicting values and interests, as disagreements over the original burial location or method of disposal that were covered in some detail in the preceding chapters. However, they also raise additional, unique policy issues. In particular, once a body has been "properly" laid to rest, what are sufficient or justified grounds for disinterring it, particularly if some family members do not accept that it should be disinterred? Should the legal framework require full consensus amongst the family before a body can be disturbed? How can this be balanced against the strong desires and needs, sometimes driven by cultural imperatives, to ensure that the body is in the most appropriate resting place for eternity? And should account be taken of the circumstances of the original burial and whether there was sufficient opportunity for consultation and airing of all relevant views?

### Reform considerations

- 18.70 This review is an opportunity to review the legal framework for individual disinterment, to ensure that it is operating efficiently and effectively. Our view is that the framework for disinterment should be flexible enough to allow for disinterment when appropriate, but not so permissive that disinterment can occur without proper consideration of the relevant public and private interests, including public health interests. An overhaul of other aspects of the legal framework for burial and cremation would also require an assessment of the implications for the particular framework for individual disinterment, and whether adjustments would be needed to ensure a cohesive and consistent regulatory framework overall.
- 18.71 Disinterment is rare, and disagreement about disinterment is rarer still. Our assessment is that the legal framework should seek to ensure that public interests are adequately safeguarded, and the views of the family are given effect without unnecessary complication. We invite submissions as to the best way to achieve this policy goal.
- 18.72 In considering the desirability of reform, we have first attempted to identify the interests that should guide decision-making about disinterment. The protection of public health will clearly be a significant factor for more recent graves, as is recognised by the current framework. However, it would be rare for disinterment to be prohibited on public health grounds. Such considerations speak to how the disinterment should be carried out and the conditions imposed, but other interests will have greater relevance in deciding whether the disinterment should proceed at all.

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848 *Pauling v Williams* CA69/00, 20 July 2000.

The relevant interests vary depending on the reason for the disinterment. They could include (besides public health considerations):

- (a) the respectful handling of human remains, including cultural and spiritual sensitivity;
- (b) the views of the family or whānau of the deceased;
- (c) the wishes of the deceased, if known;
- (d) relevant matters under tikanga Māori;
- (e) the contractual or property rights of the plot holder and cemetery operator, if any;
- (f) finality of disposal;
- (g) the time elapsed since burial and the likely level of decomposition;
- (h) the appropriateness of the burial location;
- (i) the impact on other graves, for example if the deceased is buried in a communal plot; and
- (j) matters of general public interest, such as completing a police investigation, or leaving archaeological sites undisturbed.

18.73 The main reform issues relate to identifying the most appropriate decision makers to make the key decisions, and ensuring adequate consideration of the factors outlined above. At present, the Ministry of Health makes discretionary decisions on the granting of the disinterment licence, covering both public health issues and issues of whānau and hapū consent. The courts also provide oversight of the overall appropriateness of the decision to disinter where an application is made by a party who objects to the disinterment.

18.74 There are a number of potential inter-relating reform questions:

- (a) Who should be the key decision maker in relation to public health considerations? Options include keeping this role with the Ministry of Health, or devolving this role to local authority health protection officers.
- (b) Should the requirement to obtain public health approval through a disinterment licence be limited to a particular time period, for example 50 or 75 years after the burial of the deceased?
- (c) Who should have the role of checking that family/whānau/hapū consent has been obtained? Should this be the body that oversees public health issues (whether the Ministry of Health or local government), or a different body such as the cemetery manager or the courts?
- (d) Should court approval of disinterment applications be required for all disinterment applications; only for contentious applications; or only for applications where the remains of the deceased will be removed from the cemetery or burial ground in which they were originally buried?
- (e) Should court approval of a non-contentious disinterment application be required:
  - where the application is to rectify a mistake by cemetery staff (approximately 10 per cent of applications to disinter); or
  - where the application is made after a particular time period (for example 50 or 75 years after the burial of the deceased)?

- (f) Which is the appropriate court to have oversight of disinterment applications? Should this be the High Court (*status quo*), the District Court, or the Family Court? If the deceased is buried in an *urupā*, should the Māori Land Court have a role?

*(a) Who should be the key decision-maker in relation to public health considerations? Options include keeping this role with the Ministry of Health (status quo), or devolving this role to local authority health protection officers.*

- 18.75 The Ministry of Health has core expertise in assessing public health risks, and is experienced in considering disinterment applications, as it has traditionally held this role. The number of applications is not large, and one consideration is whether the applications may be more likely to receive consistent treatment if they are dealt with by one agency. However, the Ministry has advised us that in practice, applications are first received by health protection officers at district health boards, who do the initial processing and ensure that the applications are complete.
- 18.76 Devolution of the assessment of public health considerations to local government would be consistent with other reform proposals raised in this Issues Paper. Under reformed burial and cremation legislation, local authorities could have the role of issuing disinterment licences, and environmental health protection officers could have the power to oversee disinterment. The local authority mandate would be limited to imposing appropriate conditions that address health issues, and ensuring that the disinterment is carried out in accordance with these conditions. The removal of remains without a disinterment licence would become a regulatory infringement, and local authorities would be responsible for enforcement.

*(b) Should the requirement to obtain a public health approval through a disinterment licence be limited to a particular time period of time, for example 50 or 75 years after the burial of the deceased?*

- 18.77 Health issues are important in the initial period after burial, when decomposition is most rapid. As time passes, these issues become less significant. In developing any new framework, we invite submissions on the merits of setting a time period beyond which public health approval through a disinterment licence is not required, such as 50 or 75 years from the date of burial. Other approvals, such as those from the cemetery manager or land owner, would still be needed after this time. It may also require a court order or some other independently verified check on family consent, depending on the answers to questions raised below.

*(c) Who should have the role of checking that family/whānau/hapū consent has been obtained? Should this be the body that oversees health issues (whether the Ministry of Health or local government), the cemetery manager or the courts?*

- 18.78 Currently the issue of family consent is addressed both by the Ministry of Health in considering the disinterment licence application, and, where an objection is raised, as part of the oversight of the courts. This may have advantages in ensuring that consent issues are addressed by the applicant at an early stage, and may help to filter out applications where there is a lack of consensus. Court oversight is a useful safeguard to ensure that consent issues and family interests have been properly considered.
- 18.79 But it may be inefficient to address issues of consent in relation to the disinterment licence. There are questions as to whether in principle, a government department should have the role of checking consent, and which potential decision maker has the appropriate expertise to take responsibility for this function. The process could be streamlined so that the disinterment licence is assessed solely on the basis of public health considerations, with the issue of consent being verified by a different decision maker.
- 18.80 One approach would be to develop a model under which consent would be initially verified by the cemetery manager. For example, those seeking disinterment could be required to

demonstrate to the cemetery manager that the family of the deceased were in agreement (in addition to providing the disinterment licence verifying that public health considerations had been considered). The cemetery manager has an involvement in the process by virtue of having control of the cemetery where the grave is located. The cemetery manager's approval of the disinterment proceeding could be made conditional on being satisfied of the family's agreement, or where the cemetery manager is not duly satisfied, approval could be conditional on the applicant obtaining a court order.

18.81 This could be supported by a framework along the lines of the following:

- (a) The applicant applies for a disinterment licence from the Ministry of Health or from the local authority that addresses public health considerations (discussed above); and
- (b) The applicant presents a statutory declaration to the cemetery manager confirming consultation with the broader whānau/family, that there are no objections, and that they have obtained the express consent of the deceased's spouse/partner and children, if any, or the parents of the deceased if the deceased was a minor; and
- (c) The application includes the signed authorisation of the deceased's spouse/partner and children, if any, or the parents of the deceased if the deceased was a minor; and
- (d) The cemetery manager permits disinterment only if satisfied that the family is in agreement, based on the available information.

18.82 This has some parallels to the approach taken to cremation, where the applicant for cremation is required to certify that the near relatives of the deceased have been informed of the proposed cremation, whether any near relative has expressed any objection to the proposed cremation, and the ground for any objection.<sup>849</sup> If the land owner or cemetery manager, the plot holder, and the family of the deceased all consent, under this alternative model, disinterment might proceed subject to the conditions of the disinterment licence. However, if any of these parties object, a court order would then be necessary to authorise disinterment.

18.83 This option would require cemetery managers to have processes in place to deal with disinterment applications and the verification of family consent. These processes exist to handle the disinterment of ashes from cemeteries (which is not subject to legal controls). However, one factor to bear in mind is the relatively low numbers of disinterment applications and it may be inefficient to create a specific model for the rare occurrences where disinterment arises.

18.84 If the role of checking that family consent has been obtained remains with the Ministry or is conferred on local authorities in conjunction with the devolution of disinterment licensing, the revision of the burial and cremation legislation would provide an opportunity to enact clear legislative authority for this decision making function, which is presently lacking, and to review the content and range of current guidance that supports this function. For example, the implications of the *Takamore v Clarke* decision may need to be addressed or reflected for the benefit of future applications. It may also be an opportunity to consider the status of the guidance and assess whether decisions on disinterment applications should be made publicly available.

*(d) Should court approval of disinterment applications be required for all disinterment applications; only for contentious applications; or only for applications where the remains of the deceased will be removed from the cemetery or burial ground in which they were originally buried?*

18.85 The advantage of requiring a court order is that it would be an open and transparent process, and would have established appeal pathways. It could be argued that family consent may not always be available to act as the necessary safeguard of interests in support of leaving the

849 Cremation Regulations 1973, sch 1, Form A.

- remains undisturbed, and that court approval for disinterment should generally be sought, regardless of whether there is family consent (or an absence of objections). For example, a surviving family member who was overruled at the time of burial could seek to rectify a situation they remained unhappy about by applying for disinterment once other family members had died or were no longer able to object.
- 18.86 Some may regard the oversight of the court as a necessary check and balance in the process, given the range of public and private interests that are raised by disinterment applications. We note that the list of potential factors and interests we identify in paragraph [18.72] above is quite extensive, and this in itself may indicate the desirability of retaining the oversight of the court, even where there is consensus.
- 18.87 For many people, finality may be more important than selecting the “right” location for burial, if that location means that the body has to be shifted from its original burial place. The disinterment of a body may be more emotive than the disinterment of ashes, and there may also be cultural or spiritual concerns to be considered. The potential impact of any liberalisation of disinterment procedures on the frequency of burial disputes would also need to be assessed. We consider that it would be against public policy to allow successive disinterment of one individual, for example, regardless of family consensus.
- 18.88 For contentious applications, our view is that disputes over disinterment that reach the courts should be dealt with under the same broad framework that would apply to family disputes over the initial place of burial or mode of disposal, as discussed in chapter 16. The underlying principles are similar, or the same: there may be strong cultural or religious values at play, possible family tensions, and conflicting views about the appropriateness of shifting the remains and the new resting place.
- 18.89 No matter what eventual statutory framework might be preferred, we are of the view –as for disputes over burial location or mode of disposal – that the courts should retain jurisdiction to hear these matters where there are disputes over disinterment. We endorse the view of the Supreme Court expressed in *Takamore v Clarke* that the courts are best-placed to consider the multitude of intersecting values and interests around the decision of whether or not to disinter, where families cannot come to agreement between themselves.
- 18.90 The main argument against requiring court approval of all disinterment licences is that it might be unduly costly and inaccessible for applicants. Once public health issues have been addressed, it could be argued that disinterment is a matter for private interests and should not require additional supervision, and that when the relatives of the deceased all agree or acquiesce, there is no compelling public interest for additional oversight. We note, however, that if all the relevant parties are in agreement, and the application is unopposed, the court costs will be less than for a contested hearing.
- 18.91 An option would be to limit the requirement for court oversight to situations where the body is to be reinterred outside the cemetery in which the initial burial took place. Around half of the total disinterment licence applications seek the reinterment of remains in another place of burial, with a few also requesting disinterment so that the remains may be cremated. This limitation on court oversight could be a means of identifying cases that are more likely to be contentious. The relocation of the deceased within the same cemetery is less likely to arise in the context of an underlying disagreement as to the appropriate place of burial. It usually occurs either to rectify a mistake by cemetery staff or to relocate remains to an area where neighbouring plots are available for purchase by family members to allow for future interments close to the deceased.

*(e) Should court approval of a non-contentious disinterment application be required where the application is to rectify a mistake by cemetery staff (approximately 10 per cent of applications to disinter) or where the application is made after a particular time period (for example 50 or 75 years after the burial of the deceased)?*

- 18.92 In the case of mistakes, a process might be developed where the cemetery manager could make a statutory declaration or affidavit as to the mistake, and certify that the family has been informed and has consented to the disinterment and reinterment.
- 18.93 Alternatively the option noted above, where reinterring the body within the same cemetery or burial ground would not require court approval, would provide a simpler process in situations where the body is mistakenly buried in the wrong plot.
- 18.94 One consideration is whether court oversight is a useful tool and check on numbers of disinterments when there has been a mistake. Requiring a more onerous process (such as court approval) to correct a mistake may indirectly help to reduce the number of mistakes.
- 18.95 Where a disinterment takes place after a significant period of time, the oversight of the court may be the only real check, as there will be no discernible public health issues and family consent may not be available. We note that disinterment after such a long time period would be rare.

*(f) Which is the appropriate court to have oversight of disinterment applications? Should this be the High Court (status quo), the District Court, or the Family Court? If the deceased is buried in an urupā, should the Māori Land Court have a role?*

- 18.96 Currently the High Court has jurisdiction in respect of disinterment applications. We note that the District Court might be an appropriate forum, with the ability to refer cases to the Family Court or the Māori Land Court as required. Alternatively, if jurisdiction in relation to burial disputes is shifted to the Family Court, as we raise as an option in chapter 17, it may also be desirable on policy grounds for jurisdiction in relation to disinterment applications to be shifted to the Family Court.
- 18.97 Unlike many provisions of the Burial and Cremation Act, the requirement for a disinterment licence applies to urupā as well as cemeteries and burial grounds. The Māori Land Court may therefore be a candidate for jurisdiction in relation to applications for disinterment from urupā.

#### CONSULTATION QUESTIONS

- Q20 Do you support the option of giving the Family Court responsibility for dealing with disputes concerning memorialisation (for example the erection of headstones) or the custody of ashes?
- Q21 Do you feel that scattering or burying human ashes in public places is problematic? If so what are the most appropriate measures for dealing with this issue?

### *Additional questions*

18.98 In addition to the questions posed above, we also raise the following questions for consideration by those who wish to address or respond to them.

#### Scattering of ashes

- (a) Is there a need for cultural or other reasons to designate particular public places where the scattering or burying of human ashes is either permitted or restricted?
- (b) Is consultation with local iwi and hapū an effective way to ensure that this activity does not give cultural offence?
- (c) Do the public have enough guidance and information about this activity? How could this be improved?

#### Disinterment of individual graves

- (d) Do you have any comments or views about the list of interests that should guide decision-making about disinterment?<sup>850</sup> Are there any other interests that should be included?
- (e) Do you have any comments or views about the reform questions raised in relation to the disinterment of individual graves?<sup>851</sup>

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850 See [18.72] above.

851 See [18.74] above and discussion following.